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No. _____

In The

# Supreme Court of the United States

BENJAMIN J. CAYETANO and EARL I. ANZAI,

*Petitioners,*

v.

CHEVRON USA, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the Takings Clause authorize a court to invalidate state rent control or land use regulatory legislation on its face, without regard to whether it diminishes economic value or use or causes any physical invasion of the plaintiff's property, when the court concludes that the statute does not substantially advance a legislative purpose?

2. Does the facial constitutional validity of state legislation depend on whether a federal court predicts that it will achieve its objective?

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioners Benjamin J. Cayetano, the Governor of Hawaii, and Earl I. Anzai, the Attorney General of Hawaii, and respondent Chevron USA, Inc. Earl I. Anzai was substituted below for his predecessor as Attorney General, Margery S. Bronster, pursuant to Fed. R. App. P. 43(c)(2).

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 224 F.3d 1030, and is reprinted in the appendix hereto, App. 1, *below*. The opinion of the District Court granting respondent's motion for summary judgment is reported at 57 F. Supp. 2d 1003 (D. Haw. 1998) and is reprinted at App. 43.

## JURISDICTION

The Ninth Circuit entered its judgment and opinion on September 13, 2000. Petitioner filed timely petitions for reconsideration and for reconsideration *en banc* on September 27, 2000. The Ninth Circuit denied these petitions on October 26, 2000 and entered an amended order on October 31, 2000. App. 69-72.

The jurisdiction of this Court to review the decision of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Fifth Amendment to the Constitution provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides, in section 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws."

The relevant portion of Act 257, Haw. Rev. Stat. § 486H-10.4 (1997), is reprinted at App. 73.

## STATEMENT OF THE CASE

Hawaii enacted Act 257 in 1997 to try to temper the State's relatively high retail price of gasoline. Haw. Rev. Stat. § 486H-10.4. The Act limits the amount of rent that oil distributors may charge gasoline retailers who lease company-owned filling stations to 15% of gross profit from gasoline sales and of gross revenue from sale of other products. Chevron owns 64 stations in Hawaii, which it leases to operators who sell Chevron gasoline at retail.

Chevron filed suit in the United States District Court for the District of Hawaii against the Governor and Attorney General of Hawaii, claiming that Act 257 facially effects an unconstitutional regulatory taking and seeking declaratory relief. Chevron moved for summary judgment, advancing several arguments. The District Court granted Chevron's motion, holding that the act constituted a regulatory taking because it failed to substantially advance a legitimate government interest.

The District Court found that the station rent control law was intended to be and was logically related to the legitimate purpose of reducing retail gasoline prices. App. 55-56. But the Court understood itself to be bound by the precedents of the Ninth Circuit and of this Court

to apply a higher standard of scrutiny, captured in the phrase "substantially advance" a legitimate government interest. The Court reasoned that since the Act did not regulate the sale of a station lease by an operator, the lessee could capture a "premium" in the sale price, reflecting the difference between the regulated and market rents, and thus could defeat the goal of holding down gasoline prices. The Court also concluded, somewhat inconsistently, that there would be no savings (and no premium), because Chevron could recover lost rent by raising the price it charged the operator for gasoline. The District Court expressly rejected the State's argument that the proper standard of review was whether the legislature reasonably could have believed that the statute would hold down retail gasoline prices. App. 52-54.

On appeal, the Ninth Circuit held that the District Court had applied the correct standard but vacated the grant of summary judgment and remanded for trial. The Court of Appeals, too, rejected the State's argument that the validity of a land use ordinance should be evaluated under the traditional standard of the due process clause, "whether 'the Legislature rationally could have believed the Act would substantially advance a legitimate government purpose.' " App. 6. The Court felt itself bound by circuit precedent, *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998). The Court interpreted "substantially advance" to "depend[ ] on whether it will in fact lead to lower fuel prices." App. 24-25. Finding that the affidavits relied on by the trial court did not clearly resolve this question, the Court of Appeals remanded for a trial. It recognized that the inquiry would deal with "questions of predictive fact,

rather than historical fact." App. 18. The Court expressly found that the legislation does not deprive Chevron's property of economic viability, noting that the legislation allows it to charge "more than it would otherwise have charged under its own rental program." App. 25.

Judge William Fletcher concurred in the result but disagreed with the majority's analysis. App. 28. Within the constraints of circuit precedent, he argued that the court should have applied the more lenient due process standard of reasonableness previously applied to rent and price control legislation. App. 28, 37. He concluded:

> I fear that under the majority opinion virtually all rent control laws in the Ninth Circuit are now subject to the "substantially advances a legitimate state interest" test, and that this test may invalidate many of these laws. . . . The question before the judiciary is not the advisability of rent control laws but rather their constitutionality. Ever since its retreat from economic substantive due process at the end of the 1930s, the Supreme Court has essentially left it to the other branches of government to decide . . . whether to adopt rent and price controls." App. 40-41.

## REASONS FOR GRANTING THE WRIT

### I. The Ninth Circuit's Rule That the Validity of Property Regulation be Analyzed Under the Takings Clause Raises an Important Issue Which This Court has Recognized as Unsettled and Conflicts with Decisions by State Supreme Courts and by the Court of Federal Claims.

Claims that legislation takes property from an owner, by authorizing a permanent physical invasion or by destroying its economic viability, properly invoke the Takings Clause. By contrast, claims that state legislation falls outside the police power, because it fails to rationally relate to a legitimate state purpose, long have been considered under the Due Process Clause. Since 1996, however, the Ninth Circuit has insisted that challenges to the rationality and validity of land use regulation not only may but must be analyzed under the Takings Clause, rather than under the Due Process Clause.[1] Moreover, the Ninth Circuit has made it clear that it will apply a higher

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[1] *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc). Indeed, the Ninth Circuit interpreted this Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989), to mean that the "constitutional bar on 'private takings' preempts [more generalized] substantive due process claim[s]." *Armendariz*, 75 F.3d at 1322. Thus, challenges to the validity of land use ordinances may be brought only under the Takings Clause. Other circuits have rejected this view, *e.g.*, *John Corp. v. City of Houston*, 214 F.3d 573, 583 (5th Cir. 2000), and it has been severely criticized. *See* Toni Massaro, *Reviving Hugo Black? The Court's "Jot For Jot" Account of Substantive Due Process*, 73 N.Y.U. L. Rev. 1086, 1100-03 (1998). This collateral issue would disappear if this Court held, as it should, that challenges to the reasonableness of legislation may not be brought under the Takings Clause.

standard of scrutiny when it reviews state legislation under the Takings Clause than it would under the Due Process Clause, although it has never presented any principled justification for this much greater intrusion into State democratic decision making. Such error and confusion concerning core constitutional provisions require prompt cure by this Court.

In this case, the court below held that Hawaii's Act 257 must be found to violate the Takings Clause if the trial court finds that it will not "substantially advance" the state's legitimate purpose of reducing the retail price of gasoline. The Ninth Circuit's decision clearly commits that court to use of the Takings Clause for second guessing the wisdom of virtually all state and local legislation regulating land, bringing doctrinal confusion in this area to an appalling level and endangering the relationship between federal courts and state governments. This Court needs to resolve this confusion and restore the appropriate and traditional deference that federal courts show state legislation addressing social and economic problems.

This Court has not authoritatively resolved whether challenges to the means – ends rationality of legislation may be resolved under the Takings Clause. Indeed, contradictory indications by the Court may have fostered the confusion that now reigns in the lower courts, making timely guidance from this Court particularly appropriate. Of course, this Court authored the long line of cases establishing that arbitrary legislation violates due process. *E.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). The confusion stems from *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), where the Court, while

unanimously upholding a large lot zoning ordinance against a facial challenge, stated that a taking occurs where the law "does not substantially advance legitimate state interests." For that proposition, the *Agins* opinion, issued near the end of the 1979 Term, cites only a due process decision, *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928). Although the Court has quoted *Agins* subsequently, it neither has explained its meaning nor ever struck down a regulation as a taking for failing this test. It is high time the Court clarify that the *Agins* formulation amounts only to inadvertent *dicta*.

The Court has given several indications that it is ready to do so. Indeed, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), even though the Court struck down retroactive health care liability legislation, five justices stated that questions about the legitimacy of economic legislation should be addressed under the Due Process, rather than under the Takings Clause. *Id.* at 545-6 (Kennedy, J., concurring); *id.* at 554 (Breyer, J., dissenting). Justice Kennedy explicitly noted the "uneasy tension" between his view and the *Agins* test. *Id.* at 545. He concluded: "Given that the constitutionality of the Coal Act appears to turn on the legitimacy of the Congress' judgment rather than on the availability of compensation . . . the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." *Id.* Justice Breyer, for four dissenters, wrote, "As this language [of the Takings Clause] suggests, at the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." *Id.* at 554 (emphasis

in original). Even if these congruent conclusions from five justices do not technically constitute a holding with which the Ninth Circuit is in conflict, it does indicate that a majority of the Court rejects the linchpin of the decision below.

The Court also raised but expressly did not settle the appropriateness of the "substantially advance" test for a takings challenge in *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687, 704 (1999). In *Del Monte Dunes*, the Court affirmed liability based on an instruction permitting the jury to decide whether denial of a permit related to a legislative interest, without deciding whether the Takings Clause authorized such an instruction, because the defendant had explicitly agreed to the instruction. In this case, by contrast, defendants contested the standard for review in both the Court of Appeals and the District Court. App. 6, 52. In addition to the Court, the authors of the separate opinions went out of their ways to "express no view," *Del Monte Dunes* at 732 n.2 (Scalia, J., concurring in part and concurring in the judgment), and "offer no opinion," *id.* at 753 n.12 (Souter, J., concurring in part and dissenting in part), about whether the *Agins* test was correct. Plainly, the justices view this question as open and timely.

*Del Monte Dunes* also made clear the important analytical distinction between exaction cases and regulation cases. The Court has required that transfers of physical possession or ownership from a private owner to the government in exchange for approval of a development plan, referred to generally as exactions, both "substantially advance" and be "roughly proportional" to the goals of the relevant legislation. *Dolan v. City of Tigard*,

512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). But these cases address the discreet and sensitive question of when a permit condition can effect an actual physical occupation without resulting in a taking and have no logical bearing on when a regulation becomes so burdensome as to effect a taking. The Court confirmed in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999), that the rough proportionality test of *Dolan* had been fashioned for exactions and had no role in assessing regulations of use. The same logic requires the conclusion that the substantially advance test of *Nollan* has no role in reviewing a regulation. Without the transfer of physical possession there is neither need nor justification for a higher level of scrutiny of the state's reason for its action. Thus, in another useful way, the Court recently has shed light on the error below.

In sum, all nine justices recently have authored or joined opinions admitting the need for clarification of this important issue. Thus, the Court has identified and framed the question here cleanly presented, making this an unusually compelling case for the grant of certiorari.

The Ninth Circuit's approach directly conflicts with decisions by the Rhode Island and Washington Supreme Courts squarely holding that challenges to the rationality of land use regulation must be brought under the Due Process, not the Takings Clause. *Brunelle v. Town of South Kingston*, 700 A.2d 1075, 1083-84 n.5 (R.I. 1997) ("[T]he arbitrariness or capriciousness of a particular state action is properly examined under the light of the Fourteenth Amendment due process clause and not the Fifth Amendment takings clause."); *Mission Springs Inc. v. City of*

*Spokane*, 954 P.2d 250, 258 (Wash. 1998). No doubt more courts would be in conflict with the decision if they did not feel bound by the Court's pronouncement in *Agins*.

The Ninth Circuit rule also squarely conflicts with a long line of decisions by the United States Court of Federal Claims, which has jurisdiction over all takings claims for just compensation against the United States under the Tucker Act. That Court has consistently held that challenges as to whether legislation "substantially advances" a government interest cannot be entertained under the Takings Clause and fall outside that court's jurisdiction. *Bamber v. United States*, 45 Fed. Cl. 162, 165 (1999); *Florida Rock Industries, Inc. v. United States*, 45 Fed. Cl. 21, 42 (1999); *Loveladies Harbor v. United States*, 15 Cl. Ct. 381, 390 (1988), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994) ("[N]o court has ever found a taking has occurred solely because a state interest was not legitimately advanced . . . "). The Claims Court's refusal to hear challenges to the validity of federal legislation may reflect its sensitivity to limitations on the liability of the United States under the Tucker Act.

The confusion below extends beyond these direct conflicts as lower courts have struggled to make sense of the Court's inconclusive statements. In *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993 (Cal. 1999), where the California Supreme Court upheld a rent control ordinance against a facial takings challenge, Justice Kennard explicitly requested this Court to resolve the confusion sown by *Agins*:

> [R]ecently, Justice Kennedy of the United States Supreme Court has questioned the appropriateness of using a means ends test as the measure

> of whether a taking has occurred. . . . Outside the *Nollan/Dolan* context, should a means-ends test be used to determine whether a taking has occurred, or instead should means end testing remain within due process jurisprudence? Only the high court can resolve this question and, given the importance of this area of law, I respectfully suggest that it do so when the opportunity next arises.

*Id.* at 1012-13 (Kennard, J., concurring).[2] *See also John Corp v. City of Houston*, 214 F.3d 573, 579 n.9 (5th Cir. 2000) (avoiding "knotty issue" of whether claim that government action failed to advance a public purpose should be brought under Due Process or Takings Clause). Commentators have argued for years that it is anomalous to test the validity of legislation under the Takings Clause. John Echeverria, *Takings and Errors*, 51 Ala. L. Rev. 1047 (2000); Jerold Kayden, *Land Use, Regulations, Rationality, and Judicial Review: The RSVP in the* Nollan *Invitation*, 23 Urb. Law. 301 (1991).

The Ninth Circuit's insistence on testing the rationality of state legislation under the Takings Clause plunges litigants into a host of logical and practical problems. Certainly, the most harmful effect has been the heightened level of scrutiny applied to economic legislation just because land is the asset being regulated. The

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[2] Justice Brown, who dissented, echoed the plea of Justice Kennard: "If such measures [*i.e.*, rent control ordinances] are capable of withstanding a *Nollan*-inspired takings clause analysis, the high court ought to tell us so, probably sooner rather than later." *Santa Monica Beach, Ltd., supra*, 968 P.2d at 1047.

difference in standard between regulation of land and of other contractual or property assets seems particularly indefensible in this case, where Chevron both leases land and sells gasoline to the retailer. Hawaii's regulation of rent is subject to demanding review under the Takings Clause, but a regulation of wholesale gasoline prices would be considered under the more generous standard of the Due Process Clause. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 769-70 (1968). No reasoned justification for decreasing dramatically the scope of legislative discretion to regulate commercial real estate as opposed to other business assets has ever been offered. We address this issue at length below under the heading of the next argument.

The Due Process Clause serves as a substantive limit on governmental power; laws found in violation generally are held invalid. The Takings Clause, by contrast, "is designed not to limit governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis in original). Legislation challenged as invalid may impose quite minor burdens on a property owner, as the Ninth Circuit found was the case here, App. 25, which in no way resemble the severe losses targeted by the Takings Clause. Arbitrary legislation does not raise the fundamental question of whether it forces "some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Arbitrary legislation imposes burdens that no one should bear.

Entertaining challenges to the validity of legislation under the Takings Clause raises perplexing questions about remedy. The constitutionally required remedy for a regulatory taking is an award of just compensation. *First English, supra,* 482 U.S. 314-22. But it is difficult to understand what constitutes "just compensation" when the fault of the law is that it does not achieve its objectives, since this fault bears no economic relationship to the property owner's loss, if any.

Respondents here sued seeking declaratory relief. But this Court has repeatedly held that "[e]quitable relief is not available to enjoin an alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1016 (1984); *see also Presault v. ICC,* 494 U.S. 1, 11-17 (1990). The plurality in *Eastern Enterprises, supra,* strove to fashion an exception to this rule when the payment of compensation by government would be nonsensical, as it would be here, 524 U.S. at 519-22, but the need to improvise such an exception and its uncertain scope suggest the continuing problems of jamming square pegs in round holes. Similarly, some courts have limited plaintiffs' "temporary takings" damages, after a statute has been held invalid under the Takings Clause, to damages based on "actual losses," the measure that would have been used if the case had been brought under the Due Process Clause, rather than "compensation for the period during which the taking was effective." *First English, supra,* 482 U.S. at 321. *See, e.g., Corrigan v. City of*

*Scottsdale*, 720 P.2d 513, 518-19 (Ariz. 1986). Paying compensation often would confer windfalls on owners.[3] Moreover, because the public, by definition, does not benefit from arbitrary legislation, the fairness argument for compensation by taxpayers fails.[4]

The issue presented here is among the most important that the Court can resolve at this time. The Ninth Circuit's rule subjects virtually all state and local government regulation touching land in the western third of the United States to illogical and unjustifiably intense judicial

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[3] In *Tampa-Hillsborough County Expressway Authority v. A.G.W.S. Corp.*, 640 So.2d 54 (Fla. 1994), the Florida Supreme Court initially had held that the state highway department's authority to mark the location of future roads on an official map constituted a taking because it did not advance a legitimate state interest. After trial courts began to permit affected property owners jury trials on compensation for temporary takings, with no preliminary showing of any economic injury, the Court changed the doctrinal basis for its invalidation to the Due Process Clause to limit indemnification to those who actually suffered damage.

[4] The Ninth Circuit also has felt compelled to create an exception from the finality rules of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) for regulatory takings claims brought under the "substantially advance" rubric. Because such claims do not depend on how much economic value is left in the plaintiff's property or the extent to which it has been compensated, but on the effectiveness of the legislation, they are considered immediately ripe. *Richardson v. City and County of Honolulu*, 123 F.3d 1150, 1165 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998). This exception further demonstrates the illogic of addressing issues of validity under a constitutional provision concerned with compensation for what the government takes away for valid reasons.

second-guessing, fomenting extensive, expensive litigation under a fundamentally incoherent constitutional doctrine. This Court should take responsibility for clearing up this dangerous confusion, having recognized that *Agins* is problematic and is creating havoc in the lower courts. This Court can save all lower courts from troublesome confusion and wasted effort by now making it clear that challenges to the means ends rationality of legislation should be brought under the Due Process and not the Takings Clause.

## II. The Ninth Circuit Adopted a Standard of Review That Requires Courts to Evaluate the Wisdom of State Legislation Contrary to Fundamental Constitutional Principles and in Conflict with the Decisions of Other Federal Courts of Appeal and State Supreme Courts.

Whether challenges to the validity of state land use regulation are adjudicated under the Due Process Clause, as we urge, or under the Takings Clause, the standard of review is crucial to maintaining a proper balance between democratic governance and the rule of law. Since at least the 1930's, this Court generally has employed a rational relationship test for Due Process and Equal Protection Clause challenges to social and economic legislation. Under this test, the Court upholds legislation that a rational legislator could have believed would advance a permissible public purpose. *E.g., Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955). The Court has exercised "strict scrutiny" in cases where legislation touches upon certain "fundamental interests," so that the legislation will be held invalid unless the state can show that it is

necessary to advance a compelling state interest. *E.g., Moore v. City of East Cleveland*, 431 U.S. 494, 499-500 (1977) (occupancy statute struck down for burdening interests of members of extended family in living together). Some few cases may fall in an intermediate category, where the interests affected are unusually important but not fundamental and where a tighter fit between means and ends must be demonstrated than in rational basis cases. *See e.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). Although the Court has divided over how to determine which interests require a higher level of scrutiny, this basic structure has been remarkably consistent.

Land use regulation has long been considered social and economic regulation subject to rational basis scrutiny. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). And the validity of rent control laws, when not confiscatory, has been subject to invalidation only when "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988). Experts dispute whether or under what conditions rent control laws are efficacious. But the wisdom of this long line of cases is that the usefulness of a rent control or other land use laws is a question that should be decided by the people through their elected representatives and not by judges.

In this case, the Ninth Circuit held that Act 257 must "substantially advance" the public interest, that legislation "substantially advances" an interest if it "bears a reasonable relationship" to that interest, and that "[w]hether Act 257's rent cap is reasonably related to its objective of lowering fuel prices certainly depends on

whether it will in fact lead to lower fuel prices." op at 14. This standard affords the decision of the Hawaii legislature no deference at all. It instructs the trial judge to void the statute if, based upon testimony concerning "predictive facts," a telling oxymoron, he predicts that the Act will not work. This Court should not permit lower federal courts to exercise such supervisory power over the merits of state legislative decisions. Such a judicial role resembles far too closely that prevalent during the discredited *Lochner* era, when courts struck down maximum hour legislation because they did not think that it would protect the health of workers or minimum wage legislation because they did not think it would improve the economic position of workers. *Lochner v. New York*, 198 U.S. 45 (1905); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

The court below should have instructed the trial court to uphold Act 257 only if there is no possibility that it can achieve a lawful objective. "[W]hether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed* that the [Act] would promote its objective." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984) *quoting Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981) (emphasis in original).[5] It is bedrock constitutional law, that "[e]ven if

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[5] The Ninth Circuit argues that *Midkiff* is irrelevant, because a lower standard of rationality is appropriate in a case involving expropriation and payment of compensation. *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1158 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998). This argument is weak. First, it ignores that the *Midkiff* Court expressly equated

the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment." *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937). In this case, the district court held that providing a flexible maximum rent logically aimed at reducing gasoline prices (App. 55-6), but did not substantially advance that goal, making clear that the court used a raised standard. Both the District Court and Ninth Circuit explicitly rejected Hawaii's argument that the lower, traditional level of scrutiny should be used. App. 6-7, 52-54. But this Court long ago stated the correct view:

> "Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." *Chicago, B. & Q. R. Co. v. McGuire*, 219 U.S. 549, 569 (1911).

Federal court scrutiny of state social and economic legislation at this level of intrusiveness, not only violates

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the scope of the legislature's discretion under the eminent domain power with that under the police power, 467 U.S. at 240. Second, the argument illogically advocates a higher level of scrutiny for the validity of legislation having a smaller interference with the owner's control of his property. Chief Justice Rehnquist has argued that *Midkiff* provides the right standard for assessing regulatory legislation. *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 511 n.3 (1987) (dissenting opinion).

long accepted understandings of the distinct roles of judges and elected representatives, it tramples on important virtues of federalism. The sovereign powers of the states can be impaired as surely by federal judges wielding expansive interpretations of vague constitutional provisions as by Congress passing the limits on its enumerated powers or commandeering state agencies, as in, for example, *United States v. Morrison*, 529 U.S. 598 (2000) and *New York v. United States*, 505 U.S. 144 (1992). The Court wisely has long heeded the admonition of Justice Brandeis that open-ended review under the Fourteenth Amendment poses a special threat when a state may "serve as a laboratory" trying "novel social and economic experiments," because broad, non-textual review makes it easy to "erect our prejudices into legal principles." *New State Ice Co. v. Liebman*, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting). State experimentation simply is not possible if a federal judge has the authority to decide, on the basis of expert testimony about "predictive facts," whether a new state law "will in fact lead to lower fuel prices." App. 25. This approaches placing a state legislature into federal receivership.

The Ninth Circuit has not offered any reasoned justification for imposing a more demanding standard on land use or rent control regulation. The court below followed its own *Richardson* precedent, also striking down a rent control provision, which mechanically quoted the "substantially advance" language from *Agins* and drew an expansive command from this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519 (1992). In *Yee*, the Court did suggest in dicta that rent control laws could be amenable to the "substantially advance" test restated in *Nollan v.*

*California Coastal Commission*, 483 U.S. 825 (1987), but such authority hardly justifies the intrusive measurement of efficacy directed here. First, *Nollan* actually employed a quite deferential standard, requiring only a "logical nexus" between a regulation and goal, something found by the District Court to be present here. App. 55-56. Moreover, to the extent *Nollan* requires greater scrutiny, *Del Monte Dunes* has made it apparent that *Nollan* applies only to permanent physical occupations, not mere regulations, as explained above, at 9.

*Yee* also suggested that the ability of a tenant to capture the difference between regulated rent and market rent in conveying his leasehold to a new tenant "might have some bearing" on whether the ordinance was valid. 503 U.S. at 530. Hawaii does not dispute that lessees' capture of regulatory savings should be considered in assessing the rationality of the statute. But *Yee* nowhere even hints that the ability of a lessee to convey his interest *ipso facto* elevates the scrutiny to which the statute is subject or casts onto the state a duty to prove that the ordinance will work.

The Ninth Circuit explicitly ruled that all land use regulation must meet this test. Its decisions stand in stark conflict with many decisions in other circuits employing a highly deferential standard in Due Process challenges to state and local government land use regulations, including rent control ordinances. The Fourth Circuit, for example, has stated that challenges to land use laws "can survive only if the alleged purpose behind the state action has no conceivable rational relationship to the exercise of the state's traditional police power through

zoning." *Sylvia Development Corp. v. Calvert County, Maryland*, 48 F.3d 810, 827 (4th Cir. 1995). The Seventh Circuit even requires a property owner to show that an adverse zoning decision not only is arbitrary and irrational, but also show the violation of another constitutional right or that state law does not provide an adequate remedy. *New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990). It would be difficult to overstate the aversion of most lower federal courts to open-ended review of local land use decisions under standards such as endorsed by the Ninth Circuit here. *See, e.g., RRI Realty Corp. v. Incorporated Village of Southhampton*, 870 F.2d 54 (2d Cir. 1989) (refusing to entertain substantive due process challenge to denial of permit unless plaintiff preliminarily can show an entitlement to it under state law).

The Ninth Circuit's ruling also conflicts directly with important recent decisions by the highest courts of California and New York interpreting the *Agins* "substantially advance" formula so as to preserve traditional legislative discretion. In *Santa Monica Beach, supra*, the California Supreme Court sustained the granting of a demurrer to a takings challenge to a city rent control law, where the plaintiff wished to try to show that the law failed to achieve its goals, the factual inquiry ordered by the Ninth Circuit in this case. The Court stated: "In sum, with rent control, as with most other such social and economic legislation, we leave to legislative bodies rather than to the courts to evaluate whether the legislation has fallen so far short of its goals as to warrant repeal or amendment." 968 P.2d at 1007. The conflict over respective willingness to second guess legislation between the Ninth Circuit and the California Supreme Court will draw

floods of litigants into federal as opposed to state courts in our largest state. Similarly, the New York Court of Appeals, in "easily" sustaining a town's zoning amendments, held that the *Agins* means-ends test only requires that land use laws bear a "reasonable relationship" to legitimate objectives, an approach indistinguishable from traditional due process analysis. *Bonnie Briar Syndicate v. Mamaroneck*, 721 N.E. 2d 971 (N.Y. 1999).

Justice Kennedy recently lamented that "[t]he imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539, 545 (Kennedy, J., concurring in part and dissenting in part). This is a case where the Ninth Circuit's interpretation requires federal courts to strike down legislation when it concludes that elected legislators have made an unwise estimate of the benefits of legislation. This Court urgently needs to restore the correct balance between federal judicial power and state political processes.

## III. Review Should Be Granted Because This Case Presents an Important and Clear-Cut Issue That Has Present Consequences for States in the Ninth Circuit and Will Control Further Conduct of This Case.

The Court should grant review in this case, even though the Ninth Circuit remanded for a trial. The Ninth Circuit has clearly and finally established the legal standard to be applied, and it is cleanly presented for review in this case. Subsequent litigation will subject Hawaii to the need to defend the wisdom of its legislation and the

prescience of its legislators. As in *United States v. General Motors*, 323 U.S. 373, 377 (1945), another takings case where the Court of Appeals had remanded for trial under a troubling legal standard, the decision below is "fundamental to the further conduct of the case." *See also Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964).

That the standard adopted below conflicts with numerous decision of this and other courts, as we show above, provides further reason for immediate review. *Forsyth v. City of Hammond*, 166 U.S. 506, 514-15 (1897); *accord, General Motors*, 323 U.S. at 374; *Michael v. United States*, 454 U.S. 950, 951 (1981) (White, J., dissenting).

Most importantly, the issue is important and has present consequences for Hawaii and other states. *Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997). The Ninth Circuit rule subjects land use and rent control legislation over the western part of the United States to intrusive federal court oversight in violation of principles of both separation of powers and federalism. As a result, it invites a plethora of inappropriate and expensive litigation challenging the efficacy of many state and local laws. The lower courts struggle in present confusion about the governing principles. The Court would not serve well either the states or the lower courts to postpone decision on these issues until the conclusion of trial and further appeal in this case.

## CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| CHEVRON USA, INC., a Pennsylvania Corporation,<br>*Plaintiff-Appellee,*<br>v.<br>BENJAMIN J. CAYETANO, Governor of the State of Hawaii; EARL I. ANZAI,* Attorney General of the State of Hawaii,<br>*Defendants-Appellants.* | No. 99-15108<br>D.C. No. CV-97-00933-ACK<br>OPINION |

Appeal from the United States District Court for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Argued and Submitted
November 4, 1999 – Honolulu, Hawaii

Filed September 13, 2000

Before: Dorothy W. Nelson, Robert R. Beezer, and William A. Fletcher, Circuit Judges.

Opinion by Judge Beezer; Concurrence by Judge W. Fletcher

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*Earl I. Anzai is substituted for his predecessor Margery S. Bronster, as Attorney General for the State of Hawaii. Fed. R. App. P. 43(c)(2).

## COUNSEL

Jack A. Rosenzweig and Ted Gamble Clause, Deputy Attorneys General, Honolulu, Hawaii, for the defendants-appellants.

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## OPINION

BEEZER, Circuit Judge:

Hawaii Governor Benjamin J. Cayetano and Attorney General Earl I. Anzai (collectively "the State") appeal the district court's judgment in favor of Chevron U.S.A., Inc. Chevron filed suit for declaratory and injunctive relief against enforcement of Section 3(c) of Act 257 of the 1997 Hawaii State Legislature ("Act 257"). Act 257, inter alia, proscribes the maximum rent that oil companies can collect from dealers who lease company-owned service stations. Both parties moved for summary judgment on whether the maximum permissible regulated rent effects an unconstitutional regulatory taking. After concluding that it does, the district court granted Chevron's motion and denied the State's motion. The State appeals only the grant of summary judgment to Chevron; it does not appeal the denial of its own motion. We have jurisdiction under 28 U.S.C. § 1291. Because genuine issues of material fact exist, we vacate the judgment and remand for further proceedings.

I

In response to concerns about the highly concentrated gasoline market in Hawaii and the resulting high cost of gasoline to consumers, the Hawaii Legislature enacted Act 257 on June 21, 1997.[1] Act 257, inter alia, regulates the maximum rent an oil company can charge dealers who lease its service stations.

Chevron is one of two gasoline refiners and one of six wholesalers in Hawaii. At the retail level, Chevron sells most of its gasoline through company-owned stations, which are leased to independent dealers. Chevron leases 64 service stations to dealers in Hawaii. From 1984 through the end of 1996, Chevron relied on *estimated* gasoline sales to calculate the rent owed by the lessee dealers. After determining that the amount of gross rent receipts was not satisfactory, Chevron initiated a new nationwide dealer rental program in January 1997. Chevron restructured the manner in which it calculated lease rates. This program, which the parties agree would be in effect in Hawaii absent Act 257, requires the lessee dealer to pay a monthly rent, consisting of an escalating percentage of the dealer's gross margin on actual, rather than estimated, gasoline sales. For instance, the rent would be calculated as 18% of the gross margin up to $18,000; 32% of the portion between $18,000 and $28,000; and 38% of the portion over $28,000. In contrast, Act 257 establishes a maximum regulated rent of 15% of gross margin.

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[1] The relevant portions of Act 257 were later codified as Hawaii Revised Statute § 486H-10.4.

The maximum rents Chevron projects it could receive under the statutory scheme imposed by Act 257 totals $6,126,646 for 1998. Chevron's projected expenses total $6,292,855, exceeding Chevron's projected rental income by $166,209. Chevron concedes, however, that it has not fully recovered its expenses relating to dealer stations (including ground lease rents, real property taxes, ordinary maintenance and depreciation) from rent in any state in the last 20 years.

Instead, Chevron relies on supply contracts to earn a profit. Dealers who choose to rent a station from Chevron must, as a condition of their lease, agree to purchase from Chevron all of the fuel necessary to satisfy demand at that station for Chevron gasoline. The price under the supply contract is unilaterally set by Chevron. Both the lease agreement and the supply contract permit the dealer to transfer his or her occupancy rights upon obtaining Chevron's written consent and paying a transfer fee set by Chevron. Act 257 does not prohibit such transfers.

In conjunction with the alienability of the leaseholds, the parties stipulated to the following facts:

> 34. The existing dealer at the time of the enactment of Act 257 may be able to sell his leasehold at a premium that derives from the value of the dealer's leasehold interest, given the reduced rent imposed by Act 257, assuming Chevron does not object in good faith when the selling dealer seeks Chevron's consent to the assignment.
>
> 35. Assuming everything else remains equal, the market value of the lessee-dealer leasehold

reasonably could be expected to increase as the amount of the rent payable decreases.

Based largely on these facts, Chevron moved for summary judgment on its takings claim.[2] Chevron argued that Act 257 effects a regulatory taking because it fails to substantially advance a legitimate state interest. Chevron also maintained that Act 257 prevents the company from receiving a just and reasonable return. Finally, Chevron contended that Act 257 is unconstitutional because it neither provides individualized consideration, nor contains a mechanism for obtaining relief from confiscatory rent cap provisions. Because the district court resolved the first argument in Chevron's favor, it declined to reach the other two.

On appeal, the State challenges both the standard used by the district court to evaluate Chevron's regulatory taking claim and the court's application of that standard in the summary judgment context.

II

"States have broad power to regulate . . . the landlord-tenant relationship . . . without paying compensation for all economic injuries that such regulation entails." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982). When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge. *See, e.g., Pennell v. San*

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[2] Chevron's other three claims (42 U.S.C. § 1983, due process and equal protection) were dismissed without prejudice by stipulation of the parties and are not at issue in this appeal.

*Jose*, 485 U.S. 1, 11-12 (1988). "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The question in this case is whether Act 257 goes too far. To analyze that question, the district court concluded that "the appropriate inquiry is whether [Act 257] substantially advances a legitimate state interest." In reaching this conclusion, the court explicitly rejected the more deferential standard urged by the State. The State argues that the courts should look only to whether "the Legislature rationally could have believed the Act would substantially advance a legitimate government purpose."[3]

To support this position, the State relies on a footnote in Chief Justice Rehnquist's dissenting opinion in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987):

> [O]ur inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation. When considering the Fifth Amendment issues presented by Hawaii's Land Reform Act, we noted that the Act, "like any other, may not be successful in achieving its intended goals. But 'whether in fact the provisions will accomplish the objectives is not the

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[3] Both the test used by the district court and that suggested by the State require a legitimate state interest. In this case, the district court found that the purpose of Act 257 is to "reduc[e] gasoline prices for Hawaii's consumers." On appeal, the parties do not contest this finding. Likewise, the parties do not dispute the legitimacy of this interest.

> question: the [constitutional requirement] is satisfied if . . . the . . . [State] Legislature rationally could have believed that the [Act] would promote its objective.' " *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984).

*Keystone*, 480 U.S. at 511 n. 3 (alterations in original). The State's reliance on this quote is unsound for two reasons. First, as the district court correctly noted, Midkiff dealt with a physical taking, rather than a regulatory one. In a physical taking, the government exercises its eminent domain power to take private property for "public use." Importantly, the government intends to take the property and is willing to pay compensation to the landowner. We have recognized that a more deferential standard applies in those circumstances. *See Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1158 (9th Cir. 1997), *cert. denied*, 119 S.Ct. 168 (1998) ("[W]e see nothing inconsistent in applying heightened scrutiny when the taking is uncompensated, and a more deferential standard when the taking is fully compensated."); *see also Hall v. City of Santa Barbara*, 833 F.2d 1270, 1280 n. 25 (9th Cir. 1986) ("It makes considerable sense to give greater deference to the legislature where it deliberately resorts to its eminent domain power than where it may have stumbled into exercising it through actions that incidentally result in a taking.").

Second, the State's argument is foreclosed by our decision in *Richardson*. In *Richardson*, we established that land use regulations, including rent control ordinances like Act 257 that permit the capture of a premium, do not effect a taking if the regulation "substantially furthers a legitimate state interest." *Richardson*, 124 F.3d at 1164; *see*

*also Keystone*, 480 U.S. at 485 ("[L]and use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.' ") (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

III

While we recognize the concurring opinion's dissatisfaction with our application of the "substantially advances" test, we do not believe that our holding today either expands *Richardson* or contravenes Supreme Court precedent.

Relying on *Pennell v. City of San Jose*, 485 U.S. 1 (1988), the concurrence asserts that rent control can ordinarily only be challenged as violative of due process, rather than as a regulatory taking. We read *Pennell* differently. In that case, a landlord challenged the constitutionality of a city rent control ordinance on three grounds: (1) the Takings Clause; (2) Due Process; and (3) Equal Protection. *See id.* at 4. The Court summarized the Takings Clause claim as follows:

> § 5703.28 of the Ordinance establishes the seven factors that a hearing officer is to take into account in determining the reasonable rent increase. The first six of these factors are all objective, and are related either to the landlord's costs of providing an adequate rental unit, or to the condition of the rental market. Application of these six standards results in a rent that is "reasonable" by reference to what appellants contend is the only legitimate purpose of rent control: the elimination of "excessive" rents

> caused by San Jose's housing shortage. When the hearing officer then takes into account "hardship to a tenant" pursuant to § 5703.28(c)(7) and reduces the rent below the objectively "reasonable" amount established by the first six factors, this additional reduction in the rent increase constitutes a "taking."

*Id.* at 9.

The Takings Clause claim in *Pennell* was not based on the mere existence of rent control, but was instead dependent on the hardship provision. Indeed, because rent control is not a per se taking, *see FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987), the landlord had to argue why this particular rent control ordinance effected a taking. To do so, he focused on the hardship provision, as the other factors apparently established a reasonable rent. The Court neither explicitly nor implicitly approved or disapproved of the landlord's argument. In fact, the Court declined to reach the merits of the Takings Clause claim because the hardship provision had never been applied. *See Pennell*, 485 U.S. at 9-10. The Court did proceed to analyze the landlord's remaining constitutional arguments. It did not, however, intimate in any way that rent control provisions should *only* be analyzed under the Due Process Clause. Rather, the Court determined that the Takings Clause claim was premature and then analyzed the Due Process Clause claim under the Due Process "reasonableness" test.

Moreover, to the extent that "something else" is required to challenge a rent control ordinance under the Takings Clause, the existence of the premium in this case suffices. The stipulated possibility that an incumbent

dealer will be able to capture the value of the decreased rent in the form of a premium separates Act 257 from an ordinary rent control situation, where such a transfer is prohibited.

Logically, it makes far more sense for us to analyze Chevron's regulatory takings claim under the Takings Clause test than it does to review it under the Due Process Clause test. Chevron raised a Due Process Clause claim in its First Amended Complaint, but chose not to move for summary judgment on that claim. Once the district court in this case granted Chevron's summary judgment motion on the Takings Clause claim, Chevron dismissed its remaining claims without prejudice. Thus, there is no Due Process claim for us to review, even if we were so inclined.

The concurring opinion also downplays the significance of the Supreme Court's language in *Yee v. City of Escondido*, 503 U.S. 519 (1992). Although the Court in *Yee* did not conclusively announce the applicable test for a regulatory takings challenge to a rent control statute, it did suggest that the possibility of a premium similar to the one in this case "might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* at 530. The Court then cited *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which employs the "substantially advances" test.

The *Yee* Court went slightly further than in *Pennell* and held that the facial regulatory takings challenge was ripe. *See Yee*, 503 U.S. at 534. The Court did not reach the

merits of the regulatory takings claim, however, because it concluded that the issue was not fairly presented in the certiorari petition. *See id.* at 537. In reaching that conclusion, the Court noted that "were we to address the issue here, we would apparently be the first court in the Nation to determine whether an ordinance like this one effects a regulatory taking." *Id.* at 538.

Although the Court recognized the novelty of the regulatory takings claim, it did not take any position on its merits. The ordinance in *Yee* is very similar to Act 257, in that the transfer of the mobile homes in *Yee* and the service station leaseholds here both create the possibility of a one-time transfer of wealth in the form of a premium that inures to incumbent lessees. Had the Court in *Pennell* rejected a regulatory takings challenge such as the one posed by Chevron in the instant case, as the concurring opinion suggests, the Court in *Yee* would not have needed to expressly decline to reach the issue. We believe that the Court's treatment of the regulatory takings issue in *Yee* further undermines the concurrence's reading of *Pennell*.

*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), gives additional support to the application of the "substantially advances" test to Chevron's Takings Clause claim. Although the Court recognized that it has not provided a "thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions," it noted that the jury instructions given by the trial court regarding the "substantially advances" test were consistent with the Court's previous general discussions of regulatory takings liability. *Id.* at 704. As support for this

statement, the Court cited several land use regulatory takings cases, including *Yee*. *See id.* It is apparent to us that the Court viewed the rent control ordinance in *Yee* in the same manner as the land use regulations in the other cases. It is further apparent to us that when challenged as a regulatory taking, each is subject to the same "substantially advances" test.

We have great difficulty finding Supreme Court precedent to support the concurring opinion's assertion that rent control should be viewed differently than other land use regulations. *Accord Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1021 (Cal. 1999) (Baxter, J., dissenting) ("[W]e cannot assume that decisions upholding other forms of price control are authority for rejecting a takings clause challenge to a rent control ordinance.").

The concurring opinion also does not satisfactorily explain how to deal with *Richardson*. *Richardson* is the law of our circuit and has conclusively answered the question of what test should be applied in this case. Nevertheless, the concurring opinion attempts to avoid the holding of *Richardson* by inventing a "certainty" requirement that does not exist. The concurrence would limit the "substantially advances" test to cases in which "the existence of the premium capture is essentially beyond dispute." We do not believe that *Richardson* may faithfully be read so narrowly.[4]

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[4] We also do not believe that our decision today expands the holding of *Richardson*. We save for another day the question of whether the "substantially advances" test applies outside the context of rent control statutes that permit the capture of a premium.

Finally, we note that other federal cases have applied the "substantially advances" test in considering a regulatory takings challenge to a rent control ordinance. *See Federal Home Loan Mortgage Corp. v. New York State Div. of Hous. and Community Renewal*, 83 F.3d 45, 48 (2d Cir. 1996) (concluding that rent stabilization law does not constitute either physical or regulatory taking); *Greystone Hotel Co. v. City of New York*, 13 F.Supp.2d 524, 527-29 (S.D.N.Y.) (concluding that rent stabilization provision substantially advanced a legitimate state interest and thus did not effect a regulatory taking); *Adamson Cos. v. City of Malibu*, 854 F.Supp. 1476, 1501-02 (C.D.Cal.1994) (concluding that city's mobile home rent control ordinance was substantially related to a legitimate interest).

In sum, we disagree with the concurrence's position that we should apply the "reasonableness" test to evaluate Chevron's regulatory takings claim. The correct test is "whether the legislation substantially advances a legitimate state interest," as discussed above, as suggested by the Supreme Court in *Yee*, as used by the district court in this case, and as established by this court in *Richardson*.

IV

Although the district court applied the correct standard, it should not have granted summary judgment. Notwithstanding the fact that both sides moved for summary judgment and agreed that summary judgment was

appropriate one way or the other, genuine issues of material fact remain.[5]

We review a district court's grant of summary judgment de novo. *See Balint v. Carson City*, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc). We determine, viewing the evidence in the light most favorable to the nonmoving party, whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact. *See id.* Because Chevron challenges Act 257 on its face, rather than as applied, Chevron bears the burden of proving by a preponderance of the evidence that the regulation does not substantially advance a legitimate state interest. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 700-01 (1999).

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[5] At least one court has held that, under similar circumstances involving cross-motions for summary judgment, a party that failed to raise the existence of genuine issues of material fact before the district court waived the right to do so on appeal. *See Shrink Missouri Gov't PAC v. Maupin*, 71 F.3d 1422, 1423 (8th Cir. 1995). Even then, however, the court proceeded to analyze whether genuine issues of material fact remained. The better-reasoned approach holds that the district court is responsible for determining whether the requirements of Federal Rule of Civil Procedure 56 are met, whether or not the parties believe that they are. *See, e.g.*, William W Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 499 (Feb.1992) ("The filing of cross-motions does not ensure that summary judgment is in order.").

A

The State argues here that Chevron was not entitled to summary judgment because the district court ignored genuine issues of fact raised by the affidavit of its expert economist, Dr. Keith Leffler. Chevron, in its moving papers, relied solely on the stipulated fact that an existing dealer may be able to sell his leasehold at a premium that derives from the increased value of the dealer's leasehold interest due to the reduced rent imposed by Act 257. Based on this possible premium transfer, Chevron argued that the benefits of Act 257 will inure to the incumbent dealer, rather than to consumers. Thus, according to Chevron, Act 257 does not substantially advance its purpose of lowering gasoline prices.

The State relied on Dr. Leffler to rebut Chevron's argument. In his affidavit, Dr. Leffler asserted that Act 257 is likely to lessen the adverse competitive effects that result from the highly concentrated gasoline market in Hawaii and thereby benefit consumers. This is so, according to Dr. Leffler, because lower monthly rent payments reduce a dealer's cost of continued operation, meaning more dealers are likely to stay in business. The presence of more dealers means a greater supply of fuel to consumers and a greater supply leads to lower prices. Therefore, Dr. Leffler predicted that the rent cap would act to lower retail gasoline prices. Although Dr. Leffler acknowledged that an oil company could raise the wholesale cost of gasoline to dealers in order to make up for lost rent, he believed that wholesale oil suppliers would be unlikely to do so because such action would lead directly to reductions in volume as dealers would react by raising their street price. He also believed that while a

premium transfer was possible, an incumbent dealer could not be expected to capture the net present value of the reduced rent because the net present value would depend on too many unknown variables, such as the oil company's rent policy, the future level of gasoline margins, and the sales of goods other than gasoline. Even if new lessee dealers could estimate the present value of rent reductions accurately, Dr. Leffler stated that any cost reductions would be fully captured by incumbent dealers only if the market for the sale of lessee dealer rights was perfectly competitive. Relying on the stipulated facts, which indicate that less than three sales of dealer rights occur per year, Dr. Leffler concluded that the market is relatively thin, rather than perfectly competitive. Finally, because Act 257 encourages dealers to stay in business longer by lowering fixed costs, Dr. Leffler asserted that Act 257 will benefit consumers even if the premium is fully captured.

In response to Dr. Leffler, Chevron proffered an affidavit from its own expert economist Dr. John Umbeck. Dr. Umbeck's opinion differs significantly from that of Dr. Leffler. Dr. Umbeck believes that Act 257 will reduce the net present value of an oil company's rental revenue and thereby discourage oil companies from building new stations or maintaining old ones. Accordingly, Dr. Umbeck asserted that Act 257 will actually increase the concentration of Hawaii's gasoline market, rather than decrease it. Because Dr. Umbeck believes that there will be fewer stations in the long run, he states that the demand facing surviving dealers will increase, thus motivating and allowing them to raise fuel prices. Finally, Dr. Umbeck disputes Dr. Leffler's conclusion that the

market for the sale of lessee dealer rights is thin. Dr. Umbeck believes that the premium value of the capped rent will be fully captured by the incumbent dealer.

The conflicting affidavits establish that genuine issues of fact remain as to whether Act 257 will result in lower gasoline prices. Whether, and to what extent, Chevron will raise its wholesale price of fuel to compensate for lost rent, and whether, and to what extent, incumbent dealers will capture the value of the capped rent in the form of a premium upon transfer of the leasehold, remain as unanswered questions. Moreover, to the extent that the district court purported to answer these questions, such resolution was premature.[6]

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[6] That the district court engaged in improper fact-finding is apparent from its summary judgment order. For instance, the court found, despite evidence to the contrary, that "[b]ecause oil companies can simply raise their wholesale prices to the same extent that rent decreases, the dealer is likely to be unaffected by the rent cap, and gas prices will remain unchanged."

Because this case will be tried to the court, rather than a jury, the question arises whether it was improper for the district court to engage in fact-finding, since it will eventually be called upon to perform that very task. This court has held that if the parties agree that all of the underlying material facts are reflected in the written record, a judge may decide factual issues and essentially convert cross-motions for summary judgment into submission of the case for trial on the written record. *See Starsky v. Williams*, 512 F.2d 109, 111 (9th Cir. 1975). The court noted, however, that that result was justified by the unique circumstances of that case. *See id.* Moreover, the court later cautioned that such fact-finding is not appropriate on an undeveloped factual record. *See TransWorld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676 (9th Cir. 1990). There, the court stated:

Admittedly, these are questions of predictive fact, rather than historical fact. Nevertheless, summary judgment is no more appropriate when predictive facts are disputed. *See Washington Post Co. v. United States Dep't of Health and Human Servs.*, 865 F.2d 320, 326 (D.C.Cir. 1989) (reversing summary judgment based on conflicting experts' predictions). In *Washington Post*, the plaintiff sought access under the Freedom of Information Act, 5 U.S.C. § 552, to certain financial disclosure forms filed by National Cancer Institute consultants. *See id.* at 321. The district court granted summary judgment in favor of the

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> [W]here the ultimate fact in dispute is destined for decision by the court rather than by a jury, there is no reason why the court and the parties should go through the motions of a trial if the court will eventually end up deciding on the same record. However, just as the procedural shortcut must not be disfavored, courts must not rush to dispose summarily of cases – especially novel, complex, or otherwise difficult cases of public importance – unless it is clear that more complete factual development could not possibly alter the outcome and that the credibility of the witnesses' statements or testimony is not at issue. Even when the expense of further proceedings is great and the moving party's case seems to the court quite likely to succeed, speculation about the facts must not take the place of investigation, proof, and direct observation.

*Id.* at 684-85. Although the parties in this case submitted a Stipulation of Facts, there is no clear indication, as there was in *Starsky*, that all of the relevant facts are contained in the written record. In fact, in the Stipulation itself, the parties clearly reserve the right to rely on other statements. Therefore, we hold that the district court erred in resolving factual disputes at this stage, even though it must do so later.

government. On appeal, the D.C. Circuit held that a genuine issue of material fact existed as to the effect of disclosure on the government's ability to obtain the information it needed from its scientist-consultants. *See id.* In so holding, the court reviewed the evidence in the record and concluded that the conflicting affidavits created a genuine issue of fact regarding the consequences of disclosing the sought-after information. The court explicitly rejected the trial court's explanation that

> [r]esolution of this dispute involves an analysis of the potential, hypothetical impairment the government might suffer. . . . Due to the nature of the inquiry, there is no definitive proof that may be adduced by either side in support of their respective contentions. At best, the parties may provide the Court with speculation from individuals who speak with varying degrees of authority.

*Id.* at 324. The court held that the district court had "short-circuited the fact-finding process." *Id.* at 326. The court further explained that:

> "Factual" issues like those presented here are rarely susceptible to definitive proof. Rather, "factual" issues that involve predictive facts almost always require a court to survey the available evidence, to credit certain pieces of evidence above others, and to draw cumulative inferences until it reaches a judgmental conclusion. In the end, the court makes its best assessment about what is most likely to happen in the future. In such an inquiry, the ultimate "facts" in dispute are most successfully approached when

> all relevant evidentiary underpinnings are fully developed.

*Id.* at 326.

As in *Washington Post*, the experts' conflicting predictions here created genuine issues of fact. A proper evaluation of Act 257 depends upon further development of the experts' underlying facts. Although both experts based their opinions on the stipulated facts, they also rely on other unproven factual assumptions. In order to determine whose predictions are more accurate, there needs to be a better understanding of the competitiveness of the market for the sale and purchase of lessee dealer rights and the elasticity of demand for gasoline. This can be attained only through additional factual development and cross-examination of the parties' expert witnesses. Cross-examination is particularly appropriate here because it is necessary for the court to evaluate the witnesses' credibility in order to evaluate their expert opinions. By adopting the predictions of Chevron's expert without the benefit of this needed information, the district court "short-circuited the fact-finding process."

B

Issues of fact do not preclude summary judgment unless they are material to the substantive claim at issue, that is, unless they "might affect the outcome of the suit under the governing law." *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 369 (9th Cir. 1998) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The factual disputes here are material only if their resolution would alter whether Act 257 "substantially advances a legitimate state interest."

In order to determine materiality, we first determine what is required by the "substantially advances" test. Obviously, a connection of some sort must be established between Act 257's means (that is, a maximum regulated rent) and the intended end (lower gas prices). The question arises whether the mere possibility that the rent cap will not achieve its purpose is sufficient to destroy this nexus. The district court, relying on *Richardson*, believed this to be the case. If that belief is correct, the factual disputes are not material because the parties concede that that possibility exists. If, however, the standard requires a closer evaluation of the likelihood that the means will achieve the end, then these disputes are material.

In *Richardson*, we held that a Honolulu ordinance that imposed a cap on rent for land under condominium units was an unconstitutional regulatory taking. The court concluded that:

> The absence of a mechanism that prevents lessees from capturing the net present value of the reduced land rent in the form of a premium, means that the Ordinance will not substantially further its goal of creating affordable owner-occupied housing in Honolulu. Incumbent owner occupants who sell to those who intend to occupy the apartment will charge a premium for the benefit of living in a rent controlled condominium. The price of housing ultimately will remain the same. The Ordinance thus effects a regulatory taking.

124 F.3d at 1166. Importantly, our conclusion in *Richardson* was based on the district court's findings that incumbent owners *will* charge a premium and that the price of housing *will* remain the same. Apparently, these findings were not contested on appeal.

Whether the price of gasoline will remain the same here is vigorously contested. The mere possibility that it will does not satisfy Chevron's burden of proving that Act 257 does not substantially further its purpose. Logically, there must be a determination of the likelihood of that possibility. Otherwise, regulatory legislation would be unconstitutional any time it was not absolutely guaranteed to achieve its purpose. Would a statute that was 95% likely to be effective fail to substantially advance its interest simply because there was a 5% chance that it would not achieve its goal? What if the statute was 99% effective? Surely the 1% chance that it would be ineffective does not, as a matter of law, mean that the statute does not "substantially advance" its purpose.

Not only does such a reading of *Richardson* fail the logic test, but it also fails to consider the language. Had the test been intended to require an absolute cause-and-effect relationship, the word "substantially" would have no meaning. For these reasons, the district court improperly relied on *Richardson* to conclude that the absence of a mechanism that prevents a premium transfer necessarily destroys the constitutionally-required connection.

The State argues that the existence of a premium is not relevant. As discussed in Section III above, however, the Supreme Court recognized this relevance in *Yee*, 503 U.S. at 530. While the existence of a premium transfer had

nothing to do with a physical taking, the Court stated that "[t]his effect might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* The Supreme Court did not hold that the possibility of a premium transfer necessarily defeated that connection; it recognized only that it "might have some bearing" on it. *Id.*

The question remains as to what exactly the connection does require. In a candid statement, the Supreme Court recently acknowledged that it has not provided a "thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions. . . . " *City of Monterey*, 526 U.S. at 704. In *City of Monterey*, the Court affirmed judgment in favor of Del Monte Dunes, a property owner who contended that the city's repeated rejections of its plans for development effected an unconstitutional regulatory taking. The Court held that the case was properly submitted to a jury. Although the Court refused to consider the City of Monterey's challenge to the jury instructions, as the City itself had proposed their essence, the Court nonetheless noted that the following jury instructions were consistent with the Court's previous discussions of regulatory takings liability:

> "Public bodies, such as the city, have the authority to take actions which substantially advance legitimate public interest[s]. . . . So one of your jobs as jurors is to decide if the city's decision

> here substantially advanced any such legitimate public purpose.
>
> "The regulatory actions of the city or any agency substantially advanc[e] a legitimate public purpose of the action bears a reasonable relationship to that objective.
>
> "Now, if the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the . . . proposal and legitimate public purpose, you should find in favor of the plaintiff. If you find that there existed a reasonable relationship between the city's decision and a legitimate public purpose, you should find in favor of the city. As long as the regulatory action by the city substantially advances their [sic] legitimate public purpose, . . . its underlying motives and reasons are not to be inquired into."

526 U.S. at 700-01. Based on these instructions, a challenged regulatory action "substantially advances" its interest if it bears a reasonable relationship to that interest.

Understanding what the "substantially advances" test requires also depends to some extent on understanding what it does not require. In *City of Monterey*, the Court declined to extend the "rough proportionality" test beyond the special context of exactions – land use decisions conditioning approval of development on the dedication of property to public use. *See id.* at 702-03. Thus, *City of Monterey* teaches that a reasonable relationship does not depend on the State's action being roughly proportional to its asserted interests.

Whether Act 257's rent cap is reasonably related to its objective of lowering fuel prices certainly depends on whether it will in fact lead to lower fuel prices. The factual issues that remain in dispute are material to the ultimate determination required in this action. We hold that the district court should not have granted summary judgment on Chevron's first argument.

C

Because the judgment can be affirmed on any basis supported in the record, we briefly consider the second and third arguments made by Chevron in its summary judgment motion, even though the district court did not. There are two ways in which a party can challenge a regulatory action on its face. The first has been thoroughly discussed above. The second depends on whether the regulation deprives an owner of the economic viability of property. An owner is not denied the economic viability of property, unless there remains no permissible or beneficial use for that property after the regulatory action. *See City of Monterey*, 526 U.S. at 700 (quoting jury instruction to that effect). Chevron has made no such showing. In fact, the evidence shows that Act 257 allows Chevron to charge approximately $1.1 million more than it would otherwise have charged under its own rental program. Although this evidence may be useful to Chevron in demonstrating the ineffectiveness of Act 257, it belies its claim of loss of economic viability.

Chevron also argues that Act 257 is unconstitutional because it fails to provide for any individualized consideration and contains no mechanism for obtaining relief

from the confiscatory rent limitation provisions. In support of this argument, Chevron relies on two state court cases and one of the two district court orders in *Richardson*. *See Cromwell Assocs. v. Mayor and Council of Newark*, 511 A.2d 1273, 1275 (N.J. Super. Ct. Law Div. 1985); *Birkenfeld v. City of Berkeley*, 550 P.2d 1001, 1028-1033 (Cal. 1976); *Richardson v. City and County of Honolulu*, 802 F. Supp. 326, 336-37 (D. Haw. 1992) ("*Richardson II*"). The precedents established in these cases do not bind us. Although addressed by the district court in *Richardson II*, in *Richardson* we declined to reach the issue on appeal. Likewise, the Supreme Court in *Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968), refused to decide whether individualized consideration and administrative relief were "constitutionally imperative." Earlier Supreme Court cases, however, have suggested that there are no such constitutional requirements. In *Bowles v. Willingham*, 321 U.S. 503, 518 (1944), the Court stated that otherwise valid price-fixing was not improper because it was on a class rather than an individual basis. Justice Brandeis stated for a unanimous Court in *Phillips v. Commissioner*, 283 U.S. 589, 596-97 (1931), that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." As evidenced by the instant action, Chevron was not denied an opportunity to seek judicial review of Act 257.

Finally, the cases relied upon by Chevron – *Cromwell Associates*, *Birkenfeld*, and *Richardson II* – are distinguishable because they involved ordinances that regulated a landlord's sole source of revenue. Imposing a maximum

rent removed the only mechanism by which a landlord could increase revenues in the event of an increase in costs. Chevron's lessee dealer stations provide Chevron with two sources of revenue. For the past 20 years, Chevron has relied on its lessee dealers' contractually-required purchase of gasoline to assure a reasonable rate of return on its service stations. Act 257 does not regulate this revenue source. Accordingly, Act 257's failure to contain an administrative relief provision does not result in a facial taking.

V

Genuine issues of material fact exist as to whether Act 257 will benefit consumers. Specifically, the record contains conflicting evidence as to whether incumbent dealers will capture a premium based on the increased value of their leaseholds due to the imposition of a maximum permissible regulated rent, thereby depriving new dealers and consumers from reaping the benefits of Act 257. Questions also remain as to whether oil companies will raise the wholesale price of fuel and thereby unilaterally offset the benefits of the Act. Because resolution of these factual issues is necessary to determine whether Act 257 substantially advances, or bears a reasonable relationship to, the State's interest in lowering gasoline prices, the district court erred in granting summary judgment. Summary judgment is likewise inappropriate on the other two grounds urged by Chevron.

We VACATE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

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W. FLETCHER, Circuit Judge, concurring in the judgment:

I disagree with the majority's analysis. Plaintiff Chevron challenges Hawaii Act 257, a rent control law limiting the amount an oil company can charge a dealer who leases a service station from the company. In a motion for summary judgment, Chevron argued that Act 257 is unconstitutional. The district court found Act 257 unconstitutional, granted Chevron's motion, and entered final judgment for Chevron. Defendant Cayetano timely appealed. We reverse and remand.

For the reasons that follow, I concur in the reversal of the grant of summary judgment to Chevron. I disagree, however, with the majority's rationale and with the task the majority has set for the district court on remand.

I

There are two distinct tests of constitutionality potentially applicable to Act 257. The first is a "reasonableness" test normally applied to rent control laws. The second is a "substantially advances a legitimate state interest" test normally applied to zoning and land use regulations. Relying on our earlier decision in *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), the majority analyzes Act 257 under the second test. The problem in this case is not determining whether the majority has properly applied that test. The problem, rather, is determining whether the test should be applied at all.

An ordinary rent control law is constitutionally indistinguishable from a price control law. Rent control involves a price charged for real property, just as price control involves a price charged for personal property. The constitutional test for ordinary rent and price control laws is the same, regardless of whether the laws are challenged under the Due Process Clause or the Takings Clause. The test has been variously formulated, but it essentially requires that the law be "reasonable" and "not confiscatory." A few examples illustrate the point.

In *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988), the Supreme Court cited a rate regulation case in upholding a municipal rent control ordinance challenged under the Due Process Clause. The Court upheld the ordinance because it was not " 'arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. . . . ' *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-770 (1968)." In *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987), the Court upheld a rate regulation challenged under the Takings Clause as "not confiscatory." Citing the same rate regulation case as *Pennell*, it wrote that a regulation is permitted under the Constitution to— " 'limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness.' " *Id.* (citing *Permian Basin Area Rate Cases*, 390 U.S. at 769). In *In re Permian Basin Area Rate Cases*, the 1968 case cited in both *Pennell* and *FCC v. Florida Power*, the Court upheld a rate set by the Federal Power Commission without specifying whether the challenge was brought under the Due Process or Takings Clause: "any rate selected by the Commission from the broad zone of reasonableness . . . cannot

properly be attacked as confiscatory." 390 U.S. at 770. In *Bowles v. Willingham*, 321 U.S. 503, 517 (1944), the Court upheld a federal rent control law after applying the same test as for a price control law: "Of course, price control, the same as other forms of regulation, may reduce the value of the property regulated. But . . . that does not mean that the regulation is unconstitutional." Finally, in *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942), the Court upheld a rate regulation challenged under the Due Process Clause because it was "reasonable" and "not confiscatory."

Beginning with *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Supreme Court developed a more stringent test of constitutionality for zoning and land use regulation cases. The zoning ordinance in *Agins* severely limited development of privately owned land in order to preserve open space for the community. The Court upheld the constitutionality of the ordinance against a regulatory taking challenge because the ordinance "substantially advance[d] legitimate state goals." *Id.* at 261. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the California Coastal Commission required owners of a beachfront house to grant a public easement across their property as a condition for receiving a permit to rebuild the house. Citing *Agins*, the Court stated, "[O]ur verbal formulations in the takings field have generally been quite different [from those applicable to due process]. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought be achieved, not that the State *could rationally have decided* that the measure adopted might achieve the State's objectives." *Id.* at 834

n.3 (emphasis in original; citations and internal quotations omitted). The Court further required that the easement have a connection, or "essential nexus," to the harm that would be caused by rebuilding the house. Absent such a nexus, the required conveyance of an easement to the public would be nothing more than "extortion." *Id.* at 837. Finally, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the city of Tigard, Oregon, required the owner of a commercial building to dedicate a portion of her property for parking and floodplain protection as a condition of receiving a permit to expand the building. The Court repeated the test from *Agins* and refined the *Nollan* "essential nexus" test. "A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " *Id.* at 385. Further, a "required dedication" from the landowner is constitutionally permissible if it bears a "rough proportionality" to the "nature and extent of the impact of the proposed development" for which the permit is sought. *Id.* at 391.

The Supreme Court has applied the "substantially advances a legitimate state interest" test of *Agins*, and its refinement in *Nollan* and *Dolan*, only in cases of severe zoning limitations on the use of land (*Agins*) and required dedications by landowners as a condition of receiving building permits (*Nollan* and *Dolan*). *See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S.Ct. 1624, 1635-36 (1999) ("[W]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use. . . . [T]his Court has [not] provided . . . a thorough

explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions."). In two cases, however, the Supreme Court has hinted that, in special circumstances, a rent control law might amount to a regulatory taking and might therefore be subject to the "substantially advances a legitimate state interest" test.

In 1988, the Court considered a San Jose, California, rent control ordinance in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). The Court made clear that the ordinance, considered as a whole, should be analyzed under the normal reasonableness test:

> The standard for determining whether a state price-control regulation is constitutional under the Due Process Clause is well-established: "Price control is 'unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. . . . ' " *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-770 (1968).

485 U.S. at 11 (citation omitted). Applying this test, the Court sustained the rent control ordinance, holding that it represented "a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that the landlords are guaranteed a fair return on their investment." *Id.* at 13.

The plaintiffs also brought a Takings Clause challenge to a specific provision in the ordinance that appeared to require a direct wealth transfer to a particular tenant based on the poverty of that tenant. Under the

ordinance, a landlord seeking a rent increase of more than 8% was required to go before a hearing officer who was authorized to consider, among other factors, individual hardship. If the proposed increase above 8% constituted " 'an unreasonably severe financial or economic hardship on a particular tenant,' " the increase could be denied. *Id.* at 6. The landlords contended that denial of a proposed increase on that ground would constitute a taking, but the Court refused to decide the challenge, or even to specify a test for deciding it, because the provision had never been applied and a decision would therefore be "premature." *Id.* at 9.

Next, in *Yee v. City of Escondido*, 503 U.S. 519 (1992), the Court addressed a takings challenge to an Escondido, California, mobile home rent control ordinance brought by owners of a mobile home park. As background to their challenge, the park owners pointed out that, despite their name, mobile homes are not mobile; once placed in a park, only about one mobile home in 100 is ever moved. See *id.* at 523. The park owners also pointed to California's Mobilehome Residency Law, which severely limited their ability to terminate mobile home owners' tenancies or prevent transfer of tenancies to purchasers of the mobile homes. The park owners contended that the rent control ordinance, when viewed against this background, amounted to a physical taking of their property. *See id.* at 525. The Court rejected this contention.

The park owners further contended that the ordinance constituted a regulatory taking, but the Court refused to consider the issue because it was not included

in the grant of certiorari. However, in rejecting the plaintiffs' claim of physical taking, the Court wrote the following:

> [T]he effect of the rent control ordinance, coupled with the restrictions on the park owner's freedom to reject new tenants, is to increase significantly the value of the mobile home. This increased value normally benefits only the tenant in possession at the time the rent control is imposed. . . . Petitioners are correct in citing the existence of this premium as a difference between the alleged effect of the Escondido ordinance and that of an ordinary apartment rent control statute. Most apartment tenants do not sell anything to their successors (and are often prohibited from charging "key money"), so a typical rent control statute will transfer wealth from the landlord to the incumbent tenant and future tenants. By contrast, petitioners contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner. This effect might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance. *See Nollan v. California Coastal Comm'n.* But it has nothing to do with whether the ordinance causes a *physical* taking.

*Id.* at 530 (citation omitted).

A panel of this court in *Richardson* relied on this passage from *Yee* in evaluating a Honolulu rent control ordinance. The ordinance limited long-term ground rents for residential condominiums and allowed condominium-owners/ground-lessees to sell their condominiums, and

their leaseholds, without restriction. It was clear that by selling their condominiums and leaseholds, the condominium owners could, like the mobile home owners in *Yee*, capture a premium representing the present value of the difference between the controlled rent for the ground lease and the open market rent that would be charged in the absence of the ordinance. Because of this one-time wealth transfer to the current condominium owners, *Richardson* treated the ordinance as a regulatory taking and applied the "substantially advances a legitimate state interest" test from *Agins*, *Nollan* and *Dolan*: "A land use regulation . . . does not effect a taking if it substantially furthers a legitimate state interest and does not deny the landowner economically viable use of his land. *Dolan*, 512 U.S. at 385" 124 F.3d at 1164. *Richardson* then struck down the ordinance because the ability of the owner to capture the premium by selling the condominium at an open market price meant that the ordinance did not "substantially further its goal of creating affordable owner-occupied housing in Honolulu." *Id.* at 1166.

The panel today greatly expands the holding in *Richardson*. Following the Supreme Court's suggestion in *Yee*, *Richardson* held that the "substantially advances a legitimate state interest" test was applicable in a case where it was clear that there was a premium resulting in a one-time wealth transfer from the landlord to the tenant. Absent such a transfer, the ordinance in *Richardson* would have been subject to the reasonableness test normally applied to rent control ordinances. In deciding whether to apply the "substantially advances a legitimate state interest test," the majority in this case does not first ask how clear it is that such a premium will be captured by the

lessee. Rather, it treats *Richardson* as creating a presumptive rule that rent control laws are to be evaluated under the "substantially advances a legitimate state interest" test rather than the reasonableness test: "We established in *Richardson* that land use regulations, including rent control ordinances like Act 257, do not effect a taking if the regulation 'substantially furthers a legitimate state interest.' *Richardson*, 124 F.3d at 1164." *Maj. Op.* at 11723.

When the majority says that "rent ordinances like Act 257" are subject to the "substantially advances a legitimate state interest" test, it appears to mean that the mere possibility of a premium capture by an incumbent tenant is enough to render a rent control ordinance "like Act 257." It writes, "The stipulated *possibility* that an incumbent dealer will be able to capture the value of the decreased rent in the form of a premium separates Act 257 from an ordinary rent control situation[.]" *Maj. Op.* at 11725 (emphasis added). But the possibility of premium capture exists under virtually all rent control ordinances. Even under ordinances under which subleasing and assigning are prohibited, subleasing and assigning (and resulting premium capture) are nonetheless often commonplace.

We do not know in this case whether the tenants will, in fact, capture a premium. But even without knowing this, the majority has determined that the "substantially advances a legitimate state interest" test should be used to test the constitutionality of Act 257. The majority might respond that it does not matter that, at the time of determining what test to apply, the Court does not know whether a premium will be captured. That is, if upon

investigation it turns out that there is no captured premium, the ordinance will pass the test. In other words, no harm, no foul. The problem with this response is that the constitutional test applied by the majority is not phrased in terms of whether a premium is captured. Rather, the test asks whether the rent control ordinance "substantially advances a legitimate state interest." Premium capture by the tenant is only one of many ways in which an ordinance can fail that test. Thus, if it turns out that there is, in fact, no premium capture, an ordinance may nonetheless be struck down because it fails for some other reason substantially to advance a legitimate state interest.

Even if our decision in *Richardson* was right, I believe that the majority is wrong to expand it beyond the category of cases in which the existence of the premium capture is essentially beyond dispute. I believe that in expanding the holding of *Richardson*, the majority's opinion undermines or even contradicts the Supreme Court's decisions in ordinary rent control cases such as *Pennell* and *Bowles v. Willingham*, as well as threatens its decisions in price control cases such as *FCC v. Florida Power* and the *Permian Basin Area Rate Cases*.

II

If the majority confined itself to *Richardson*, it would not be able to apply the "substantially advances a legitimate state interest" test to the facts of this case. Under the suggested analysis in *Yee*, and as I read *Richardson*, the prerequisite to the application of that test is that there be a clear capture of the premium resulting from the rent control ordinance. Because there is no clear showing in

this case that the premium will be captured by the lessees, the prerequisite for applying the test does not exist.

The factual foundation in this case is provided by a lengthy Stipulation of Facts filed in the district court. Stipulations 26 and 27 state that Chevron dealers can sell their dealerships (and associated leaseholds), and that the selling price is not limited either by Chevron's dealer lease or supply contracts or by Act 257. However, such a sale is subject to two conditions. First, Stipulation 30 states that Chevron could object to the sale in "good faith," as that term is defined by Hawaii Revised Statute § 486H-1: "The petroleum distributor shall not impose on a gasoline dealer by contract, rule, or regulation, whether written or oral, any standard of conduct that is not reasonable and of material significance to the franchise relationship." It is not clear from the materials available to us whether Chevron would be acting in good faith within this definition if it allowed a dealer to sell a dealership and leasehold only on condition that the premium resulting from Act 257 be passed on to the new dealer in calculating the sale price. Stipulation 34 suggests that such a condition might be in good faith: "The existing dealer at the time of the enactment of Act 257 may be able to sell his leasehold at a premium that derives from the value of the dealer's leasehold interest, given the reduced rent imposed by Act, assuming that Chevron does not object in good faith when the selling dealer seeks Chevron's consent to the assignment." Second, Stipulation 26 states that Chevron may require the payment of an unspecified "transfer fee" as a condition of permitting the sale of a dealership. It is not clear from the materials

before us whether such a transfer fee could include the premium resulting from Act 257.

Further, Act 257 only limits the amount of rent Chevron can charge its lessee-dealers. Chevron derives its revenue from them not only through rent, but also through the wholesale price for gasoline. Stipulation 15 states that Chevron requires its dealers, as a condition of their lease, to purchase Chevron-branded gasoline directly from Chevron. Stipulation 17 states, "Chevron recovers its expenses and investment costs of lessee dealer stations (e.g., ground-lease rent, real property taxes, ordinary maintenance, and depreciation) in Hawaii and throughout the United States through two principal revenue streams – rental revenue and earnings on Chevron gasoline sold through the stations." Stipulation 9 states, "Under a supply contract, the lessee-dealer markets Chevron motor fuels, which the lessee dealer buys from Chevron, *at a price unilaterally determined by Chevron*. Chevron does not enter into a dealer lease unless the dealer simultaneously executes a supply contract with Chevron" (emphasis added).

It is thus entirely within Chevron's power to prevent its lessee-dealers from capturing any premium resulting from Act 257. Chevron may have that power pursuant to its ability to object in good faith to a sale or to impose a transfer fee. Chevron certainly has that power pursuant to its ability unilaterally to increase the wholesale price of the gasoline to its dealers. Indeed, the district court specifically discussed Chevron's ability to charge more for its gasoline and thereby to capture the premium: "Defendant's expert fails to explain why the oil company would not increase the wholesale price to simply offset the

decrease in rent. . . . Neither Defendants nor Defendants' expert have offered any reason why this is not a feasible, and even likely, result."

I recognize that the district court also stated that "the Act . . . allows incumbent dealers to capture the value of the decreased rent in the form of a premium," but the court made the statement to show why the Act was not likely to achieve its purpose of lowering retail gasoline prices rather than to justify the application of the "substantially advances a legitimate state interest" test. The question under *Richardson* is not whether the terms of the Act themselves allow – *i.e.*, do not prohibit – capture of the premium; rather, the question is whether the Act creates a situation where we know the premium will, in fact, be captured. As the district court noted, the "feasible, even likely, result" is that Chevron will take that premium for itself in the form of higher wholesale prices charged to its dealers.

III

I fear that under the majority opinion virtually all rent control laws in the Ninth Circuit are now subject to the "substantially advances a legitimate state interest" test, and that this test may invalidate many of these laws. I will not undertake an extended analysis of the economic and social effects of rent control laws. Suffice it to say that the virtually unanimous opinion of economists is that, except in unusual and short-lived circumstances, they often do not achieve their stated purposes. They result in the creation of large and unwieldy bureaucracies. They do not subsidize the truly needy – the

homeless and those in public housing; rather, they subsidize those already able to pay for their own housing, including many who can easily pay an open market price. They interfere with the normal play of free market forces, thereby creating incentives that result in reduced supplies of housing, reduced maintenance and repairs on existing housing, increased housing code violations, and increased transportation inefficiencies when tenants change schools or jobs but remain in rent-controlled housing.

The question before the judiciary is not the advisability of rent control laws but rather their constitutionality. Ever since its retreat from economic substantive due process at the end of the 1930s, the Supreme Court has essentially left it to the other branches of government to decide, in their political wisdom, whether to adopt rent and price controls. The Supreme Court's hints in *Pennell* and *Yee* may signal a willingness to rethink this long-ago retreat, but at this point the Court has not yet done so.

I am not sure whether, in *Richardson*, we properly interpreted the Court's hints in *Yee* in concluding that the "substantially advances a legitimate state interest" test used in zoning and land use regulation cases should have been applied to the rent control ordinance in that case. I am inclined to think that we did not. I am sure, however, that the majority in this case extends *Richardson* beyond current law.

IV

It is not clear that Hawaii's Act 257 will result in the capture of a premium representing a one-time wealth

transfer to dealers currently leasing stations from Chevron. Thus, even assuming that *Richardson* is good law, Act 257 should not be analyzed under the "substantially advances a legitimate state interest" test. Rather, Act 257 should be analyzed under the reasonableness test applicable to ordinary rent and price control laws. While I agree with the majority that the summary judgment granted to Chevron should be reversed, I disagree with the majority about the district court's task on remand. In my view, the district court should apply the reasonableness test applied – until today – to ordinary rent and price control laws.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

| | |
|---|---|
| CHEVRON U.S.A. INC., Plaintiff, vs. BENJAMIN J. CAYETANO, ET AL., Defendants. | CIV. NO. 97-0933 ACK |

**ORDER RE: MOTIONS FOR SUMMARY JUDGMENT**

**SYNOPSIS**

(Filed Nov. 10, 1998)

The Court is mindful of the strongly felt concerns of the legislature that Hawaii's consumers are paying too much for gasoline. However, the Court finds that Act 257 as crafted fails to substantially further this legitimate state interest, and therefore effects an unconstitutional taking.[1] Section 3(c) of Act 257, which limits rents that an oil company may charge its lessee dealers, fails to benefit dealers and consumers for two principal reasons. First, similar to the condominium tenants under the rent control ordinance declared unconstitutional in *Richardson v. City and County of Honolulu*, incumbent dealers are able to

[1] The Court notes the State of Hawaii has now pursued other means to rectify these concerns by filing suit against gasoline wholesalers in Hawaii, alleging, inter alia, they have engaged in price fixing.

capture the value of reduced rent in the form of a premium upon sale of their leaseholds, and consequently, incoming lessee dealers are not benefitted by the Act. 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 1998 WL 313049 (Oct. 5, 1998), *and cert. denied*, 1998 WL 407121 (Oct. 5, 1998).[2] Second, since oil companies can offset rent reductions by increasing wholesale gasoline prices, they can unilaterally negate any benefit to be realized by dealers and consumers.

## BACKGROUND

On June 21, 1997, the Hawaii Legislature, prompted by concerns regarding the relatively high price of gasoline charged to Hawaii consumers, enacted Act 257 of the Hawaii Revised Statutes. Act 257, inter alia, implements restrictions on gasoline manufacturers and jobbers in dealing with their retail dealers. Specifically, Section 3(c) of Act 257 ("the Act") restricts the amount of lease rent an oil company may charge a lessee dealer for use of a service station.

In response to the enactment of the Act, Plaintiff Chevron brought suit against Defendants Benjamin J. Cayetano, Governor of the State of Hawaii, and Margery S. Bronster, Attorney General of the State of Hawaii, challenging Section 3 of the Act as effecting an unconstitutional taking of Chevron's property in violation of the Fifth and Fourteenth Amendments of the United

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[2] The Court notes that Act 257 was enacted before the Ninth Circuit Court issued its decision in *Richardson*.

States Constitution. Section 3 of the Act reads, in pertinent part:

> (c) All leases as part of a franchise as defined in section 486H-1, existing on August 1, 1997, or entered into thereafter, shall be construed in conformity with the following:
>
> (1) Such renewal [of the lessee-dealer's leasehold] shall not be scheduled more frequently than once every three years; and
>
> (2) Upon renewal [of the leasehold], the lease rent payable shall not exceed fifteen percent of the gross sales, except for gasoline, which shall not exceed fifteen percent of the gross profit of product, excluding all related taxes by the dealer operated retail service station as defined in section 486H-1 and 486H-plus, in the case of a retail service station at a location where the manufacturer or jobber is the lessee and not the owner of the ground lease, a percentage increase equal to any increase which the manufacturer or jobber is required to pay the lessor under the ground lease for the service station. For the purpose of this subsection, "gross amount" means all monetary earnings of the dealer from a dealer operated retail service station after all applicable taxes, excluding income taxes, are paid. The provisions of this subsection shall not apply to any existing contracts that may be in conflict with its provisions.
>
> (d) Nothing in this section shall prohibit a dealer from selling a retail service station in any manner.

Haw. Rev. Stat. § 486H-10.4 (1997).

On January 28, 1998, Plaintiff filed a motion for partial summary judgment on its Second Claim for Relief. On July 30, 1998, Defendants responded and filed a cross motion for summary judgment on all claims in Plaintiff's complaint. On August 19, 1998, and August 28, 1998, Plaintiff and Defendants each filed their respective replies. The Court heard oral arguments on September 8, 1998. Both parties agreed that this case should be decided one way or the other on summary judgment.

## SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). One of the principal purposes of the summary judgment procedure is to identify and dispose of factually unsupported claims and defenses. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The United States Supreme Court has declared that summary judgment must be granted against a party who fails to demonstrate facts to establish an element essential to his case where that party will bear the burden of proof of that essential element at trial. *See Celotex*, 477 U.S. at 322. "If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact [citations omitted], the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment." *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

Rather, Rule 56(e) requires that the nonmoving party set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial. *See T.W. Elec. Serv.*, 809 F.2d at 630. At least some "significant probative evidence tending to support the complaint" must be produced. *Id.* Legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *See British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Ins. Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Anderson*, 477 U.S. at 250-51.

The Ninth Circuit has established that "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987). Moreover, the United States Supreme Court has stated that "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Indeed, "if the factual context makes the nonmoving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be

necessary to show that there is a genuine issue for trial." *Franciscan Ceramics*, 818 F.2d at 1468 (emphasis in original) (citing *Matsushita*, 475 U.S. at 587). Of course, all evidence and inferences to be drawn therefrom must be construed in the light most favorable to the nonmoving party. *See T.W. Elec. Serv.*, 809 F.2d at 630-31.

## DISCUSSION

### I. Ripeness

Initially, the Court must determine whether Plaintiff's takings claim is ripe. As the Ninth Circuit noted in *Richardson*, there are two hurdles to a regulatory taking claim brought in federal court:

> The first hurdle, . . . that the plaintiff obtain a final decision regarding the application of the regulation to the property at issue from the entity charged with implementing the regulation . . . does not apply to facial regulatory takings claims. . . . The first hurdle thus does not apply to [Plaintiff's] argument.
>
> The second hurdle stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment; 'if a State provides adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation clause until it has used the procedure and been denied just compensation.'

*Richardson*, 124 F.3d at 1165. Because Chevron's argument that Act 257 does not substantially advance a legitimate state interest does not depend upon the extent to which

Chevron is compensated, its facial regulatory taking claim is ripe.

## II. The Takings Clause

The Takings Clause of the Fifth Amendment of the United States Constitution states: "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amend. V. The United States Supreme Court has consistently distinguished "physical takings" from "regulatory takings." A physical taking occurs when a governmental entity authorizes a permanent physical occupation of real property. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). By contrast, the regulatory taking issue typically arises when a government regulation, such as a zoning regulation or a rent control law, affects a property owner's ability to use his land. *See id.* In the words of Justice Holmes, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The Court notes that it is well established that legislative acts come to the Court with a presumption of constitutionality, *see Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 637 (1993); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83-84 (1978); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), and therefore Plaintiff faces an uphill battle in its challenge to Act 257.

**A. Facial Challenge**

When a party alleges that an act of the legislature effects an unconstitutional taking, they may bring either a "facial" challenge or an "as applied" challenge. The Supreme Court has repeatedly held that a land use regulation will be found to effect a taking if it does not substantially advance a legitimate state interest or denies the landowner economically viable use of his land. *See Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *see also, Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

The relevant inquiry in a facial challenge is whether "mere enactment" of the challenged regulation effects a taking. *See Agins*, 447 U.S. at 260. For example, in *Agins*, the city of Tiburon adopted zoning ordinances that limited development of appellant's five-acre lot to a maximum of five single-family residences. Appellants brought suit against the city, alleging that the ordinances prohibited all development of their land and thus effected a taking of their property. The California Supreme Court rejected appellants' request for a declaration that the zoning ordinances were facially unconstitutional, holding that the terms of the challenged ordinances allowed the appellants to construct between one and five residences on their property. *See id.* at 262.

The Supreme Court granted certiorari, and held that the ordinances substantially advanced legitimate governmental goals. *See id.* at 261. In reaching this decision, the Court considered the benefits of the ordinances as well as

any diminution in market value that the appellants might suffer. The Court also considered appellants' allegations that they wished to develop the land for residential purposes, that the land was the most expensive suburban property in the State, and that the best possible use of the land was residential, and held that although the ordinances limited development, they neither prevented the best use of appellants' land or extinguished a fundamental attribute of ownership. The Court further held that the general plan advanced a legitimate state interest – protection from urbanization. Finally, the Court noted that the ordinance did not impose a burden solely on one landowner, it affected development generally, and therefore the public did not benefit at the expense of a few. *See id.*

Similarly, in *Richardson,* the plaintiff brought a facial challenge to a rent control ordinance that placed a cap on renegotiated ground rent that could be charged by the owner of the land under condominium units. *See* 124 F.3d at 1163. The Ninth Circuit first considered the typical condominium ground lease scheme, noting that since the land underneath condominiums is ordinarily owned by someone other than the condominium owner-occupant, the condominium owner must lease the ground underneath the unit for long periods. The court went on to find that although these leases are initially fixed for a term of years, the rent is subject to renegotiation which typically is based on a percentage of the fair market value of the land appurtenant to the unit, exclusive of improvements, as of the date of the renegotiation. Finally, the court recognized that the ordinance at issue was enacted because the rapid rise in Hawaiian land prices often resulted in renegotiated rents several hundred times

greater than the initial fixed rent. Nonetheless, the Ninth Circuit declared the ordinance facially invalid, holding that the absence of a mechanism to prevent owner-occupants from capturing a premium upon the resale of their unit meant that the ordinance would not substantially further its goal of creating affordable housing. *See id.* at 1166.

In the instant case, Plaintiff brings a facial challenge to Act 257, arguing that the rent cap provision of the Act effects an unconstitutional taking because it fails to substantially advance a legitimate state interest and it leaves Plaintiff with no economically viable use of its land.

### B. Applicable Standard in Regulatory Takings Analysis

Defendants argue that Act 257 does not effect a taking, and is therefore constitutional. Moreover, Defendants claim that Plaintiff is applying the wrong standard in evaluating the state interest portion of the takings analysis.

According to Defendants, in order for the Act to pass constitutional muster, it is not necessary that the Act *actually* further the state interest involved, but merely that the Legislature rationally could have believed that the Act would do so. In support of this argument, Defendants cite *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984). However, *Midkiff* dealt with a physical taking, rather than a regulatqory taking, and is thus distinguishable from the present case. *See id.* at 233. In the physical taking context, the government exercises its eminent domain power to take private property for "public use."

Furthermore, once the government decides to physically take property, it must provide just compensation to the person from whom the property was taken. At issue in *Midkiff* was the propriety of the purported "public use" advanced by the government to justify the taking. *See id.* at 235. The *Midkiff* Court held that the only requirement in a physical taking, since the taking is fully compensated, is that the legislature "rationally could have believed" the taking would serve the purported "public use." *See id.* at 242.

By contrast, the present case deals not with a physical taking, but with whether there has been a *regulatory* taking, an inquiry which requires a different analysis. In the regulatory taking context, the inquiry is not whether property has been taken for a public use, but rather, whether or not a government regulation substantially advances a legitimate state interest. As clarified in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988):

> In [*Midkiff*], the Court explored the meaning of the public use requirement in the Fifth Amendment's eminent domain clause. . . . The Court in *Midkiff* did not address the somewhat different articulation of the standard applicable in cases where there was no deliberate exercise of the eminent domain power. For example, it did not mention *Agins v. City of Tiburon* . . . where it had noted that "the application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests. . . . " The *Midkiff* Court left open the possibility that less deference would be afforded where government does not intend to effect a taking than where it does. . . .

> It makes considerable sense to give greater deference to the legislature where it deliberately resorts to its eminent domain power than where it may have stumbled into exercising it through actions that incidentally result in a taking.

*Id.* at 1280. The United States Supreme Court echoed this viewpoint in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 (1987), when it stated:

> We have required that the regulation [in the takings context] "substantially advance" the "legitimate state interest" sought to be achieved, not that "the state could rationally have decided" that the measure adopted might achieve the State's objective.

*Id.* Finally, the Ninth Circuit's opinion in *Richardson*, a case discussed by both parties in the instant case, further clarified this concept:

> The language used throughout *Midkiff* indicates that deference to the legislative body's public use determination is required when the taking is fully compensated. . . . [W]e believe that Nollan-Lucas-Dolan trio does not signal a change from this longstanding rule of deference because we see nothing inconsistent in applying heightened scrutiny when the taking is uncompensated, and a more deferential standard when the taking is fully compensated.

124 F.3d at 1158. Thus, the Court finds that, in order to determine whether the Act effects a taking, the appropriate inquiry is whether the Act substantially advances a legitimate state interest, not merely whether the legislature rationally believed it would do so.

### C. Advancement of a Legitimate State Interest

The United States Supreme Court has not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between a regulation and the state interest satisfies the requirement that the former "substantially advance" the latter. *Nollan*, 483 U.S. at 834. However, the Court has made clear that a broad range of governmental purposes and regulations satisfies these requirements. *See id.*

#### 1. State Interests to be Advanced

Before determining whether a legitimate state interest is advanced by the Act, it is necessary to ascertain the specific state interests involved. Plaintiff argues that the purpose of Act 257 is to provide protection for service station lessee dealers. Defendants, however, assert that Act 257 is designed to protect consumers from the harmful effects of the highly concentrated petroleum market in Hawaii.

Defendants' contention is not without merit, for on its face, Act 257 appears to be directed toward the protection of consumers. Section 1 of Act 257 reads, in pertinent part:

> (1) The petroleum industry is an essential element of Hawaii's economy and is therefore of vital importance to the health and welfare of all people in the State of Hawaii; . . .
>
> (4) Because Hawaii is a physically small and geographically remote economy, certain of its markets tend to be concentrated. Market concentration is a function of the number of firms

> in the market and their respective market shares. In a highly concentrated market, market prices tend to rise above competitive levels. *Market prices persistently above competitive levels are harmful to consumers and the public.* Barriers to competition tend to cause supracompetitive prices to persist; and
>
> (5) The markets for oil and oil products in Hawaii are highly concentrated markets.

Haw. Rev. Stat. § 257 (1997) (emphasis added).

However, a closer examination of Act 257, specifically its legislative history, reveals another interest, namely "to provide certain protection for dealer operated retail service stations." Conf. Comm. Rep. 38, H.B. No. 1451 (1997).

While these two interests appear to be distinct from one another, they do not conflict. A thorough analysis of Defendants' argument reveals that in order to further the state's interest of protecting consumers, it is first necessary to help lessee dealers, whose viability might lead to a less concentrated – and thus more consumer friendly – market. Thus, the Court finds that while the legislature was mindful of the need to protect lessee dealers, this consideration was essentially a step toward the ultimate goal of reducing gasoline prices for Hawaii's consumers.[3]

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[3] Even if the ultimate goal of the legislature was to help lessee dealers, Act 257 would still fail to substantially advance its purpose. As discussed below, incumbent lessee dealers can capture the value of the reduced rent in the form of a premium, thereby depriving incoming lessee dealers of the benefit of the rent cap. Similarly, oil companies can offset any decrease in rent

Having ascertained the state interests to be advanced by Act 257, the Court's next task is to determine whether or not these interests are substantially advanced.

### 2. Advancement of State Interests

In support of its motion for partial summary judgment, Plaintiff argues that the Act fails to substantially advance a legitimate state interest. The Court agrees with Plaintiff, on two principal grounds.

#### a. New Dealers are Not Protected Because Incumbent Dealers Can Capture the Value of the Reduced Rent in the Form of a Premium

Defendants argue that the savings realized from reduced rent under the Act will lead to the continued business viability of independent dealers, keeping them in the market. They further argue that this, in turn, will lead to a less concentrated market, giving consumers more choices and lowering retail prices by way of increased competition.

Plaintiff argues, and the Court agrees, that the rent cap provision of the Act fails to protect new lessee dealers because it allows incumbent dealers to capture the value of the decreased rent in the form of a premium. The existence of the rent cap makes an independent

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with an increase in wholesale prices, and thereby eliminate the benefit to the lessee dealer.

dealer's leasehold interest in a service station more valuable, and this added value becomes especially significant when an incumbent dealer undertakes to sell his interest. *See* Stipulation of Facts, ¶¶ 34, 35 at 10-11. Since the Act does not prohibit an incumbent dealer from selling his or her service station lease, the rent cap provision enables these dealers to sell their stations at a premium. *See id.* at ¶¶ 28, 29. Because the dealer to whom the interest is transferred will be required to pay the premium, the overall expense incurred by the incoming lessee dealer remains the same, and as a result, there are no savings to pass along to consumers.

In support of this argument, the Court finds *Richardson*, 124 F.3d at 1150, controlling. In *Richardson*, the Ninth Circuit addressed a rent control ordinance that placed a cap on renegotiated ground rent that could be charged by the owner of the land under condominium units. The ordinance was enacted for the purpose of providing affordable housing to owner-occupants. *Id.* at 1165. The trustees of the Bishop Estate, owner of the fee simple title to the land underneath condominiums that were affected by the ordinance, brought an action contesting the constitutionality of the ordinance. Since the owner-occupant of a condominium was free to transfer his or her "rent-controlled" leasehold interest, the owner-occupant was able to capture the value of that rent cap in the form of a premium. *Id.* at 1164. The ordinance was challenged by the plaintiff as an unconstitutional taking.

The Ninth Circuit affirmed the district court's finding that the ordinance effected a regulatory taking. According to the Ninth Circuit, since the ordinance did not provide a mechanism to prevent the lessees from capturing the

premium, the state interest in providing affordable housing was not substantially advanced, as ultimately the price of housing would remain the same. *Id.* at 1166.

Like *Richardson*, the possibility of a sales premium in the case at bar prevents the state interests from being substantially advanced. Act 257 fails to provide a mechanism to prevent dealers from capturing a premium. Indeed, cases like *Yee* and *Hall* suggest that it is inappropriate, if not unconstitutional, to fail to provide a mechanism in rent control legislation to preclude the capture of a premium. *See Yee*, 503 U.S. at 527-31; *Hall*, 833 F.2d at 1279-80. Moreover, the potential for a premium in the present case is even more compelling than that in *Richardson*, since it is likely that a lessee dealer will find it easier to part with his or her business, than would a homeowner with his or her home. Presumably, a homeowner wishes to remain where he or she lives, whereas a businessperson is likely to view maximization of profits as the ultimate business goal. Thus, because an independent dealer can unilaterally negate any benefit a transferee might receive from the Act, it fails to substantially advance the state's interest in protecting new dealers.

Defendants argue that *Richardson* is distinguishable from the present case because the purpose of Ordinance 91-96, which was at issue in *Richardson*, and the purpose of Act 257 are distinct. The primary goal of Ordinance 91-96 was to provide affordable housing for owner-occupants of condominiums subject to ground leases. The "Findings and Purpose" section of Ordinance 91-96 states, in relevant part:

The council finds that:

* * *

(3) . . . owner-occupants of condominium[s] . . . were not informed . . . of lease rent renegotiation . . . terms . . . of the lease, [which are] established unilaterally by the lessors. . . . ;

(5) . . . Unless controlled, the renegotiated lease rents may be unaffordable to many owner-occupants of leased condominium housing units . . . ;

(6) . . . owner-occupants may have no recourse but to terminate their leases or sell . . . and seek housing elsewhere . . . ;

(7)(E) Residential leaseholds have also undesirable social effects . . . [because] as the lessee advances in age, [the] lessee's income potential declines, . . . causing the lessee to give up the lease . . . ;

* * *

The council further finds and declares:

* * *

(3) . . . lease rent increases of 1,000 percent would make home ownership unaffordable to a substantial number of owner-occupants of residential condominiums. . . .

Honolulu City and County, Haw. Ordinance 91-96 § 1. Defendants argue that unlike the ordinance at issue in *Richardson*, which was enacted to provide affordable housing, the purpose of Act 257 is not to provide affordable gas station purchases, but rather, to benefit consumers. Thus, even if transferee dealers are negatively

impacted by a premium, according to Defendants, incumbent dealers will still benefit from the rent cap and will thus pass along their savings to consumers, who will thereby benefit as well. The Court disagrees.

First of all, in *Richardson*, although the owner-occupants who retained their condominiums would clearly receive a direct benefit from the rent cap each month, the Ninth Circuit nonetheless declared the Ordinance unconstitutional because it failed to prevent owners of condominiums from capturing a premium upon the sale of their units, thereby depriving the purchasers of any benefit from the rent cap and resulting in the price of housing ultimately remaining the same. Moreover, while it is possible that some lessee dealers may benefit from the Act's rent cap in the form of lower overall costs, there is no reason to conclude that such dealers will react to this savings by lowering their retail prices. Dealers may instead elect to maintain a higher profit margin, since the Act includes no mechanism to prevent lessee dealers from simply keeping their prices the same and retaining the profit from the reduced rent on a month-to-month basis. Nothing has been presented to the contrary.[4]

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[4] The parties agree that under current conditions, Act 257's rent cap will only affect 11 of Chevron's 64 lessee dealer stations in Hawaii. *See* Stipulation of Facts, ¶ 6 at 4. Thus, less than 20 percent of Chevron's stations will be impacted by the rent cap. No evidence has been presented as to how the Act affects the remaining non-Chevron stations.

The Court nonetheless finds that Act 257 fails to substantially advance a legitimate state interest, because it is probable that consumers will not benefit from the rent cap as applied to these remaining stations. First, it is possible that, like

**b. Incumbent Dealers Are Not Protected Because Rent Reductions Can Be Offset By Wholesale Price Increases**

Defendants also argue that since the rent cap provision of the Act helps incumbent dealers to maintain their viability, the market will be less concentrated, giving the consumer more choices. They go on to argue that this lowered concentration means more competition and thus lower retail prices. The Court finds it unlikely that the Act will lead to such a result.

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53 of Chevron's lessee dealer stations, the Act will not impact these other stations at all. If this is the case, then the Act will certainly not benefit consumers, since prices at these stations will remain unchanged. Second, even if the Act were to impact these stations, there is no mechanism to prevent incumbent dealers from capturing a premium upon the sale of their stations, as discussed at length above. Therefore, under either scenario, Act 257 does not substantially advance the state's interest in benefitting consumers. Furthermore, even in the absence of a captured premium, the Act still fails to advance its purpose. As discussed infra, and as acknowledged by the government, Chevron can merely offset the decreased rent by increasing their gasoline prices, thereby negating any benefit to be achieved by the Act. The Court finds no reason why other oil companies would not act likewise. In light of these considerations, it is highly unlikely that the minimal number of dealers who might be benefitted by the Act would make a competitive impact if they were to lower their prices.

Finally, the fact that Act 257 allows Chevron to charge approximately $1.1 million more than it would otherwise have charged under its own rental program further demonstrates the Act's ineffectiveness in its purpose of protecting consumers. *See* Stipulation of Facts, Table 1.

There is no dispute that Plaintiff receives income from dealers in the form of both rent and fuel sales. Importantly, the Act does not place any limitation on the price of fuel sales. Thus, an oil company can raise fuel prices to compensate for the reduction in rent, and as a result, dealers will not receive any benefit from the rent cap.[5]

Defendants argue that although oil companies are free to raise fuel prices to offset any reduction in rent, they will not do so.[6] Defendants' expert states that an

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[5] In fact, Defendants have acknowledged this possibility in their brief. Defendants' brief reads, in relevant part:

> In contrast, Chevron's lessee dealer gas stations provide Chevron with two sources of revenue. Chevron uses both to pay the expenses it incurs in leasing the service stations. The first source is the contract rent that is subject to Act 257. The second source of revenue is from the sale of Chevron gasoline to lessee dealers which lessees are required to purchase from Chevron under the supply agreement Chevron requires of the dealer lessees. The revenue which Chevron receives from its gasoline sales is substantially greater than the contract rent. Act 257 does not impose a cap on the amount Chevron may charge for gasoline and other products it sells its lessee dealers. Therefore, Act 257 does not deprive Chevron of the ability to increase the DTW price, Chevron's primary revenue stream from its lessee stations, in the event of an increase in costs.

*See* Def.'s Mot. for Summ.J., p. 28-29 (citations omitted).

[6] Plaintiff's expert disagrees. It is evident from Plaintiff's expert's declaration that this can and will occur in response to a reduction in rent. *See* Declaration of John R. Umbeck, p. 3, ¶ 5(b); p. 8, ¶ 16; p. 11, ¶ 21. According to Plaintiff's expert, Act 257 will (1) penalize Chevron and its lessee dealers, reducing

increase in wholesale fuel prices by an oil company would lead the dealer to increase his retail fuel prices. This increased retail price, according to Defendants, would result in a decreased volume of fuel sales, which would ultimately hurt the oil company. However, Defendants' expert fails to explain why the oil company would not increase the wholesale price to simply offset the decrease in rent.[7] Indeed, there is no economic reason why a shift from paying a certain sum as "rent" to paying that same sum as "fuel price" would lead a dealer to react by raising his gas prices when his overall costs remain the same. By doing so, he would be acting against his own interest, running the risk of decreased sales because of the increased prices. Instead, it is likely that if a dealer's overall costs remain the same, he will choose to remain competitive by keeping his retail prices the same. Because oil companies can simply raise their wholesale prices to the same extent that rent decreases, the dealer is likely to be unaffected by the rent cap, and gas prices will

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their viability in Hawaii; (2) penalize consumers because it can be expected to lead to higher retail gasoline prices; (3) not benefit future lessee dealers because dealers can capture the value of the rent cap in the form of a premium; and (4) not permit Chevron to earn a reasonable return on its investments. *See id.* at p. 3, ¶ 5. By contrast, Defendants' expert claims that Act 257 will (1) benefit consumers by decreasing the concentration in the gasoline market; (2) benefit both incumbent and transferee dealers; and (3) provide Chevron a reasonable return on its investment. *See* Declaration of Keith B. Leffler, p. 4-5, ¶ 7.

[7] Neither Defendants nor Defendants' expert have offered any reason why this is not a feasible, and even likely, result.

remain unchanged.[8] Consequently, the Act's purpose of protecting the dealer – and thereby protecting the consumer – would not be met.

Since Chevron's Dealer Supply Contract allows a lessee dealer to purchase fuel from suppliers other than Chevron, one might argue that if Chevron were to offset the decreased rent as described above, a dealer would simply "go elsewhere" to purchase his fuel. However, the Court finds that this is neither a feasible nor practical alternative. First, the terms of the Dealer Supply Contract state that a lessee dealer must purchase from Chevron all fuel that is necessary to fulfill customer demand for Chevron gasoline. Thus, even if a dealer wishes to discontinue Chevron gasoline and sell another brand, he may not do so if a demand for Chevron gasoline exists. Second, according to the Dealer Lease, if a lessee dealer chooses to market and sell other gasoline, he must install his own pumps and tanks, and he must make it clear to consumers that the fuel contained therein is not Chevron fuel. As stipulated to by the parties, there are only two local refinery sources: Chevron, which supplies sixty percent of the gasoline produced or refined in Hawaii, and Tesoro, which supplies forty percent. *See* Stipulation of

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[8] Although Defendants might argue that an oil company may not be able to accurately assess the amount of increase in wholesale price needed to offset the decrease in rental income, the parties agree that, where an economic benefit or loss is difficult to quantify, on average, the participants will estimate accurately. *See Declaration of Keith B. Leffler,* p. 11-12, ¶ 16 (discussing accuracy of estimating value of rent cap in order to calculate premium); *Declaration of John R. Umbeck,* p. 12, ¶ 22; p. 13, ¶ 24 (discussing estimation of rent cap value).

Facts, ¶ 38 at 11. Therefore, if a dealer chose to obtain gasoline from another source, it would be cost-prohibitive without some sort of "concerted action," since importing gasoline requires purchasing a large quantity and chartering a vessel to transport it. Because this is not a realistic alternative, the Court finds that a lessee dealer's mere ability to purchase fuel from other sources does not negate the probability that an oil company such as Chevron and Tesoro could be successful in defeating the rent cap by offsetting decreased rent with increased fuel prices.

For all of the reasons outlined above, the Court finds that Section 3(c) of Act 257 fails to substantially advance a legitimate state interest, and as such, effects an unconstitutional taking in violation of the Fifth and Fourteenth Amendments of the Constitution.[9],[10]

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[9] While the Court recognizes that Plaintiff brings a facial challenge to Act 257, the Court notes that Act 257 has been in operation since June of 1997, and yet the state claims in its lawsuit filed on October 1, 1998, which alleges antitrust violations, that the price of gasoline for consumers is an average of $.30 per gallon higher than prices on the mainland. This further illustrates the ineffectiveness of Act 257 in its purpose of benefitting consumers. However, the Court has not considered the foregoing in reaching its decision.

[10] Plaintiff also challenges the Act as effecting an unconstitutional taking on two alternate grounds: (1) that it leaves them with no economically viable use of their land, and (2) that the Act fails to provide for individualized consideration. Because the Court finds that the Act fails to substantially advance a legitimate state interest, it need not address these alternate arguments.

## III. Other Claims

Plaintiff moved for partial summary judgment only on its Second Claim for Relief, while Defendants moved for summary judgment on all claims. Defendants failed to satisfy their burden on Plaintiff's First, Third, Fourth, Fifth, Sixth, and Seventh Claims for Relief, because they did not present any evidence which demonstrates that there is no genuine issue of material fact as to those claims. This is particularly true with regard to Plaintiff's First Claim for Relief (Deprivation of Constitutional Rights in Violation of 42 U.S.C. § 1983) and Fifth Claim for Relief (impermissible taking in violation of the Hawaii Constitution), inasmuch as the Court finds that Act 257 effects an unconstitutional taking. Accordingly, summary judgment on those claims is DENIED.

In their brief, Defendants represented that Plaintiff "announced" that it would not pursue its due process and equal protection claims. However, the Court does not find anything in the record which indicates that Plaintiff abandoned these claims. If it can be established that Plaintiff did make such a withdrawal, Defendants are entitled to summary judgment on the Third, Fourth, Sixth, and Seventh Claims for Relief.

## CONCLUSION

The Court finds that Act 257 fails to substantially advance a legitimate state interest, and as such, effects an unconstitutional taking in violation of the Fifth and Fourteenth Amendments of the United States Constitution. For the foregoing reasons, the Court hereby GRANTS

Plaintiff's motion for summary judgment on its Second Claim for Relief.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, NOV 10 1998.

/s/ Alan C. Kay
Chief United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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|---|---|
| CHEVRON USA, INC., a Pennsylvania Corporation,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>BENJAMIN J. CAYETANO, Governor of the State of Hawaii; EARL I. ANZAI*, Attorney General of the State of Hawaii,<br><br>Defendants-Appellants. | No. 99-15108<br><br>D.C. No. CV-97-00933-ACK<br><br>ORDER<br><br>(Filed Oct. 28, 2000) |

Before: D.W. NELSON, BEEZER, and W. FLETCHER, Circuit Judges.

The majority of the panel has voted unanimously to deny the petition for rehearing. Judge W. Fletcher voted to grant the petition for rehearing. Judges D. Nelson and Beezer recommend denying the petition for rehearing en banc. Judge W. Fletcher votes to grant the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

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* Earl I. Anzai is substituted for his predecessor Margery S. Bronster, as Attorney General for the State of Hawaii. Fed. R. App. P. 43(c)(2).

The petitions for rehearing and rehearing en banc are DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| CHEVRON USA, INC., a Pennsylvania Corporation,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>BENJAMIN J. CAYETANO, Governor of the State of Hawaii; EARL I. ANZAI*, Attorney General of the State of Hawaii,<br><br>Defendants-Appellants. | No. 99-15108<br><br>D.C. No. CV-97-00933-ACK<br><br>AMENDED ORDER<br><br>(Filed Oct. 31, 2000) |

Before: D.W. NELSON, BEEZER, and W. FLETCHER, Circuit Judges.

The majority of the panel has voted to deny the petition for rehearing. Judge W. Fletcher voted to grant the petition for rehearing. Judges D. Nelson and Beezer recommended denying the petition for rehearing en banc. Judge W. Fletcher votes to grant the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc. Fed. R. App. P. 35.

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* Earl I. Anzai is substituted for his predecessor Margery S. Bronster, as Attorney General for the State of Hawaii. Fed. R. App. P. 43(c)(2).

The petitions for rehearing and rehearing en banc are DENIED.

## STATUTE INVOLVED

Hawaii Revised Statutes, Chapter. 486H-10.4 (1997), provides in pertinent part:

(c) All leases as part of a franchise as defined in section 486H-1, existing on August 1, 1997, or entered into thereafter, shall be construed in conformity with the following:

(1) Such renewal shall not be scheduled more frequently than once every three years; and

(2) Upon renewal, the lease rent payable shall not exceed fifteen percent of the gross sales, except for gasoline, which shall not exceed fifteen percent of the gross profit of product, excluding 11 related taxes by the dealer operated retail service station as defined in section 486H-1 and [this section] plus, in the case of a retail service station at a location where the manufacturer or jobber is the lessee and not the owner of the ground lease, a percentage increase equal to any increase which the manufacturer or jobber is required to pay the lessor under the ground lease for the service station. For the purpose of this subsection, "gross amount" means all monetary earnings of the dealer from a dealer operated retail station after all applicable taxes, excluding income taxes, are paid. The provisions of this subsection shall not apply to any existing contracts that may be in conflict with its provisions.

(d) Nothing in this section shall prohibit a dealer from selling a retail service station in any manner.

(21)

Supreme Court, U.S.
FILED
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No. 00-1198

In The

# Supreme Court of the United States

BENJAMIN J. CAYETANO and EARL I. ANZAI,

*Petitioners,*

v.

CHEVRON U.S.A. INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## STATEMENT PURSUANT TO RULE 29.6

Respondent Chevron U.S.A. Inc. is a wholly-owned subsidiary of Chevron Corporation, which is a publicly-traded company. Chevron Corporation does not have a parent corporation.

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## STATEMENT OF THE CASE

Respondent Chevron U.S.A. Inc. markets petroleum products in the State of Hawaii, primarily through retail service stations that it leases to independent dealers. Chevron is both the landlord and the wholesale supplier of the gasoline the dealers resell to consumers.

At the heart of this dispute is Section 3(c) of Act 257 of the Hawaii legislature, passed in 1997. That statute limited the rent that Respondent may charge its lessee service station dealers. The Act caps Respondent's maximum rental income at a level *below* Respondent's total real estate costs.

The commercial relationship at issue in this case has several unique facets. First, as noted above, Respondent is both landlord and a wholesaler of products to the dealers. Second, due to unique aspects of state and federal law, the dealers' leasehold interests may be sold (subject to Respondent's right in good faith to disapprove of a new dealer), meaning that there is a market for the right to do business at each service station location. Third, the parties stipulated in the district court that, all other things being equal, these circumstances, combined with the rent control provisions of Act 257, increase the resale value to the dealer of the leasehold interest.

Respondent contended in the courts below that these facts meant that Act 257's rent control provisions effected a regulatory taking of Respondent's property under the Takings Clause of the Fifth Amendment to the United States Constitution, because the law did not "substantially advance a legitimate state interest." *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

The district court agreed and granted summary judgment in Respondent's favor. Specifically, the district court found that the rent cap provision failed to substantially advance the state's legitimate interest since incumbent dealers can capture the value of the reduced rent in the form of a premium when they sell their dealerships, which leads to the overall expenses of the new dealer remaining the same as before the rent cap; as a result, there are no savings to be passed on to customers in the form of lowered gasoline prices. Petitioners' Appendix (hereinafter "Pet. App."), pp. 57-61. The district court also determined that because Respondent has two income streams from each dealer as both the landlord charging rent and the supplier of the dealer's fuel, Respondent could simply charge dealers an increased price for fuel, thereby eliminating the benefit of the rent cap to the dealers.[1] Pet. App., pp. 62-66.

The Ninth Circuit agreed that the proper legal test had been applied (Pet. App., p. 13), but disagreed that summary judgment was proper. The Ninth Circuit found *factual disputes* as to the fundamental question in the case – whether Act 257 had effected a regulatory taking – so it remanded the case to the district court for additional development of the factual record. Pet. App., pp. 17, 20.

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[1] Contrary to Petitioners' assertion, this second finding by the district court was not "somewhat inconsistent[ ]." Petition, p. 3. It simply shows that there are two *independent* reasons why Act 257 is invalid. Act 257 is *antithetical* to its purported purpose if its only result is to force Respondent to cover its costs in Hawaii by raising its wholesale gasoline prices to lessee dealers.

## REASONS FOR DENYING THE WRIT

This is a "regulatory takings" case decided under the Takings Clause of the Fifth Amendment to the United States Constitution.[2] The courts below applied long settled precedent from this Court in deciding what test to apply to determine whether a taking had occurred. Petitioners do not contend that the Ninth Circuit erred as a matter of law. To the contrary, their entire argument is premised on the assertion that the law itself is wrong. The Petition should be denied for three principal reasons: First, there is no justification for the radical change in law Petitioners demand. The courts below applied law that has been settled for more than twenty years. Second, this case does not present the far-reaching consequences asserted by Petitioners. The fact that the lower courts simply applied long-standing precedent from this Court refutes Petitioners' claim that the Ninth Circuit's opinion may disrupt land-use regulation in the West. Finally, the Petition is premature, because the Ninth Circuit remanded this case to the district court for further fact-finding. There is currently no final ruling that a taking has occurred, and, indeed, there may never be such a ruling.

Early in the last century, this Court made clear that the Takings Clause applies to more than just physical appropriation by the State of private property. Under the

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[2] It is well established that the Takings Clause is applicable to the States through the Fourteenth Amendment. *E.g., Dolan v. City of Tigard*, 512 U.S. 374, 383-384 (1994). In relevant part, the Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation."

"regulatory takings" doctrine, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *see generally Yee v. City of Escondido*, 503 U.S. 519, 523 (1992). In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978), the Court expanded on this notion, observing that "[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose."

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), the Court stated the test that is at the heart of Petitioners' argument:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citations] or denies an owner economically viable use of his land [citations]."

*Accord, Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987) ("long recognized" rule).

The Ninth Circuit unambiguously followed this rule in setting forth the standard against which the district court must judge Act 257 on remand:

> "The correct test is 'whether the legislation substantially advances a legitimate state interest,' as discussed above, as suggested by the Supreme Court in *Yee [v. City of Escondido*, 503 U.S. 519 (1992)], as used by the district court in this case, and as established by this court in *Richardson [v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998)]."

Pet. App., p. 13.

## I. THERE IS NO JUSTIFICATION FOR ABANDONING THE LONG SETTLED LAW ON WHICH THE NINTH CIRCUIT'S DECISION WAS BASED.

The courts below in this case applied settled law under the Takings Clause. Petitioners do not assert that the courts below erred in interpreting that law. Rather, they claim that the law itself is wrong. Petitioners ask the Court to abandon decades of precedent in favor of a "due process" test that would give unwarranted latitude to state legislatures and would thwart long accepted, legitimate judicial scrutiny under the Takings Clause. There is no justification for this proposed change and it should be summarily rejected.

### A. The Ninth Circuit properly applied settled law under the Takings Clause.

The Petition is a frontal attack on the validity of the "substantially advances a legitimate state interest" test. Rather than admit that they are asking this Court to overturn long settled law, Petitioners instead coyly assert that "[i]t is high time the Court clarify that the *Agins* formulation amounts only to inadvertent *dicta*." Petition, p. 7. This assertion is wrong on its face. The *Agins* Court expressly applied that test and concluded that the City of Tiburon's zoning ordinances "substantially advance legitimate governmental goals." *Agins v. City of Tiburon, supra,* 447 U.S. at 261.

Beyond that, Petitioners' suggestion that the *Agins* holding is an aberration is disingenuous, at best. *Agins* was a unanimous decision of this Court and has been the

law for more than twenty years. As noted above, the *Agins* rule was foreshadowed in the Court's 1978 *Penn Central* decision. The rule of law that Petitioners would have the Court consign to the scrap heap of mere "inadvertent dicta" has been followed by this Court in *Dolan v. City of Tigard, supra,* 512 U.S. at 385, and in *Nollan v. California Coastal Commission, supra,* 483 U.S. at 834.

Any suggestion that the "substantially advances a legitimate state interest" test was a mistake (or, "inadvertent dicta") is squarely refuted by *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987). There, the Court succinctly noted the *intentional differences* among Due Process, Equal Protection and Takings Clause standards:

> "[O]ur opinions do not establish that these [Takings Clause] standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980), not that 'the State "could rationally have decided" that the measure adopted might achieve the State's objective.' [citation omitted] . . . [T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the

> standards for due process challenges, equal protection challenges, and First Amendment challenges are identical."

*Id.* at 834 n. 3.

Nothing in *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687 (1999), cited at pp. 8-9 of the Petition, changes this analysis. *Del Monte Dunes* applies to a situation wholly unlike this case, where a landowner claims that *physical exactions* demanded by a city are excessive compared to the potential impact of a proposed development. In *Nollan* and *Dolan*, the Court dealt with exactions and dedications – i.e., requirements that landowners give up control of part of their property in exchange for the right to modify or develop it. The Court in those cases required "rough proportionality" between the dedications demanded and the development's anticipated impact. In *Del Monte Dunes*, the Court held that this analysis was inapplicable where the landowner did not claim the physical exactions were excessive. *City of Monterey v. Del Monte Dunes at Monterey, Ltd., supra*, 526 U.S. at 702-703.

But nowhere did the *Del Monte Dunes* Court suggest that it was abandoning the "substantially advances a legitimate state interest" test in regulatory takings cases. The Court noted that the district court's instructions to the jury – which asked the jury to decide whether the city's actions "did not substantially advance a legitimate public purpose" (*id.* at 700) – were "consistent with our previous general discussions of regulatory takings liability." *Id.* at 704 (citing cases, including *Agins* and *Yee*, a rent control case). The Court ultimately upheld the jury's verdict in favor of the landowner, disregarding the

"rough proportionality" claim. It did so based on the lower court's finding of an insufficient "nexus" between the City's denial of Del Monte's application and the City's stated objectives. *Id.* at 703. In other words, the City's actions did not substantially advance a legitimate public interest.

### B. The regulatory taking at issue in this case was properly analyzed under the Takings Clause, not the Due Process Clause.

Petitioners assert that there is no "reasoned justification" for analyzing Act 257's regulation of commercial real estate under the Takings Clause, when other commercial regulations may be reviewed under the Due Process Clause. Petition, p. 19. But Petitioners' *ipse dixit* argument misses the point. Petitioners would essentially have the Court turn a blind eye to the Takings Clause in regulatory taking cases. What is lacking is any "reasoned justification" for ignoring part of the Constitution and conflating Takings Clause jurisprudence with Due Process Clause jurisprudence.

Act 257 should be reviewed under the Takings Clause because the statute imposes a regulation of Respondent's use of its real property, and the Takings Clause places limits on the regulations a State legislature can impose on landowners. Property rights are important; indeed they are explicitly protected by the Bill of Rights. There is no basis for relegating commercial property rights to second class status, simply because the State of Hawaii fears interference with its legislative judgments:

> "But simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights. . . . We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of poor relation in these comparable circumstances."

*Dolan v. City of Tigard, supra,* 512 U.S. at 392.

### C. Petitioners would gut the regulatory takings doctrine and effectively immunize legislative action from legitimate scrutiny under the Takings Clause.

Petitioners' argument proves too much, for it would essentially require the Court to abandon the doctrine of regulatory takings under the Fifth Amendment and replace it with a Due Process analysis. They argue:

> "The Due Process Clause serves as a substantive limit on governmental power; laws found in violation generally are held invalid. The Takings Clause, by contrast, 'is designed not to limit governmental interference with property rights *per se,* but rather to secure compensation in the event of otherwise proper interference amounting to a taking.' *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 (1987) (emphasis in original)."

Petition, p. 12. In short, Petitioners assert that *any* lawsuit which may be characterized as questioning the "wisdom"

of State legislation may *only* be analyzed under the Due Process Clause.[3]

But adopting such a rule would mean a fundamental retrenchment of Fifth Amendment jurisprudence. While physical takings could still be analyzed under the Takings Clause, regulatory takings could not. This Court has recognized that close scrutiny of legislative actions is the *sine qua non* of *all* regulatory takings cases, since they "necessarily entail[ ] complex factual assessments of *the purposes and economic effects* of government actions." *Yee v. City of Escondido, supra,* 503 U.S. at 523 (emphasis added). Under the rule proposed by Petitioners, examining the "purposes and economic effects" of legislation is at worst impermissible; at best it is something only to be done under the Due Process Clause.[4]

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[3] To support the proposition that due process standards should be applied in all challenges to land use regulations, Petitioners cite three Circuit Court cases, where the court applied due process standards to analyze local denials of building permits or zoning requests. Petition, pp. 20-21. Those cases are inapposite, however, since the parties in those cases did *not* assert that the actions taken by the local boards violated the Takings Clause.

[4] Petitioners imply that regulatory takings cases asserting that a regulation denied economically viable use of land might still be proper under the Takings Clause. *See* Petition, p. 5. But this position cannot be squared with Petitioners' refusal to agree that courts may ever judge the "wisdom" of legislation under the Takings Clause and this Court's statement that all regulatory takings cases necessarily involve such an analysis. *See Yee v. City of Escondido, supra,* 503 U.S. at 523.

### D. Petitioners' dangerous assault on *stare decisis* should be rejected.

Petitioners urge this Court to discard its decades-old precedent in favor of a wholly new standard for regulatory takings cases. Important policy considerations, however, preclude courts from simply throwing out long-standing precedent. Among these considerations are inspiring public faith in the judiciary, providing a clear guide for the conduct of individuals, and promoting expedient resolution of disputes by creating an established body of law. *See, e.g., Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970), where the Court pointed out:

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."

*See also Vasquez v. Hillery*, 474 U.S. 254, 265-266 (1986) (*stare decisis* "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact"). Petitioners' attack on

the bedrock principles of regulatory takings jurisprudence established in *Agins* should be rejected.

## II. THIS CASE DOES NOT PRESENT THE FAR-REACHING CONSEQUENCES ALLEGED BY PETITIONERS.

Petitioners' argument ultimately comes down to a single point: The law announced decades ago by this Court is wrong because Petitioners believe it fails to give sufficient deference to legislative judgments. In the absence of such deference, Petitioners speculate, "all state and local government regulation touching land" is in jeopardy. Petition, pp. 14-15. Petitioners are wrong, both as a matter of law and fact. Petitioners' rash speculation does not provide a basis for granting the writ.

### A. The test formulated by this Court and applied by the Ninth Circuit in this case does not impermissibly infringe on the authority of the Hawaii legislature.

There is no justification for the extraordinary change in long settled law that Petitioners advocate. While we are mindful of the respect to which State legislatures are entitled, it is plain that Petitioners go too far. The "substantially advances" test is illegitimate, in Petitioners' opinion, because it "affords the decision of the Hawaii legislature no deference at all." Petition, p. 17.[5] Petitioners' ill-considered request that the Court essentially

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[5] Petitioner mistakenly refers to the test applied by the Ninth Circuit as a "standard of review." *E.g.*, Petition, pp. 3, 8,

overrule the doctrine of regulatory takings in the pursuit of "consistency" between the Due Process and Takings Clause tests is too radical a step to take.[6]

Petitioners' argument is based on an unsound major premise. While some deference to legislative judgments is appropriate, this Court has recognized since *Marbury v. Madison*, 5 U.S. 137, 176-178 (1803), that legislative power is not absolute. The Fifth Amendment Takings Clause is itself designed to be a *limitation* on legislative power. This Court has made clear that some "interference" with legislative freedom is the price we pay for living under the Constitution:

> "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them. As Justice Holmes aptly noted more than

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15. *Agins* and its progeny do not establish a "standard of review" in the traditional sense. Rather, they set forth an *evidentiary burden* that must be met to uphold a statute under the Takings Clause, i.e., that it "substantially advances a legitimate state interest."

6 As noted above, more than a decade ago, the Court made clear that the Due Process and Takings Clause tests are *intentionally* different. *Nollan v. California Coastal Commission*, *supra*, 483 U.S. at 843 n. 3.

> 50 years ago, 'a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416, 43 S.Ct. at 160."

*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles California*, 482 U.S. 304, 321-322 (1987). *See also* William A. Fischel, *Regulatory Takings: Law, Economics & Politics* 53-54 (Harvard Univ. Press 1995).

There is no reason to believe, as Petitioners contend, that the "substantially advances a legitimate state interest" test inherently "affords the decision of the Hawaii legislature no deference at all." Petition, p. 17. To the contrary, the test (both in theory and in practice) still affords *appropriate* deference to legislative bodies. For example, while the test requires that the legislation substantially advance a *legitimate* state interest, reported decisions make clear that courts have given great deference to legislative determinations of what constitutes a "legitimate state interest." *E.g., Agins v. City of Tiburon, supra*, 447 U.S. at 261 (protecting residents from "ill effects of urbanization" has "long been recognized as legitimate"); *Richardson v. City and County of Honolulu, supra*, 124 F.3d at 1165-1166 (assuming that maintaining affordable housing is legitimate interest); Pet. App., pp. 43-44, 49 (reference by district court to legislature's "strongly felt concerns" regarding gasoline prices and noting that legislative acts are presumptively constitutional). Moreover, as the district court recognized in this action, nothing in the *Agins* rule alters the presumption of constitutionality afforded all legislation. Pet. App., p. 49.

*See also Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998) (party challenging constitutionality of statute "bears a substantial burden").

**B. The test in *Agins* has been the law for more than two decades; the "parade of horrors" imagined by Petitioners has never materialized.**

Finally, the Court should reject the "parade of horrors" Petitioners speculate will occur in the absence of review. Petitioners stridently claim:

> "The Ninth Circuit's rule subjects virtually all state and local government regulation touching land in the western third of the United States to illogical and unjustifiably intense judicial second-guessing, fomenting extensive, expensive litigation under a fundamentally incoherent constitutional doctrine. This Court should take responsibility for clearing up this dangerous confusion. . . . "

Petition, pp. 14-15.

This argument misses the point, however, because it wrongly assumes that the rule applied by the Ninth Circuit first saw the light of day in this action. But as noted above, the Ninth Circuit did not break new ground in this case. Instead, it applied long settled rules announced decades ago by *this* Court.[7] *Agins* has been the law for

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[7] Petitioners imply that the Ninth Circuit acted without authority in developing the law, arguing that "[s]ince 1996, however, the Ninth Circuit has insisted that challenges to the rationality and validity of land use regulation not only may but

more than twenty years. If waves of "judicial second-guessing" and "extensive, expensive litigation" imagined by Petitioners were going to occur, that would have already happened.

Nor can Petitioners claim that this is the first case to apply the *Agins* rule in the rent control context. This Court plainly raised the possibility nearly a decade ago that a rent control law might be challenged where its only result was to transfer an economic premium to incumbent tenants. *Yee v. City of Escondido, supra,* 503 U.S. at 530.[8] In

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must be analyzed under the Takings Clause, rather than under the Due Process Clause." Petition, p. 5. What Petitioners fail to note, however, is that the holding in each of the Ninth Circuit Takings cases they cite is firmly grounded in this Court's precedents. *See Richardson v. City and County of Honolulu, supra,* 124 F.3d at 1165-1166 (following *Nollan v. California Coastal Commission, supra,* 483 U.S. at 834); Pet. App., p. 13 (reciting test from *Agins v. City of Tiburon, supra,* 447 U.S. at 260 and citing *Yee v. City of Escondido, supra*). *Armendariz v. Penman,* 75 F.3d 1311 (9th Cir. 1996), cited at note 1 of the Petition, was not relied on by either the district court or the Ninth Circuit in this case. *Armendariz* addressed the scope of official immunity. It grew out of alleged pretextual "building code enforcement sweeps" done by the City of San Bernardino allegedly so property owners would default, allowing a shopping center developer to obtain the property inexpensively. *Id.* at 1313, 1321. *Armendariz* does not address the proper test for determining whether a regulatory taking has occurred.

[8] The Court in *Yee* observed that a premium transfer like the one in this case "might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* at 530. But the Court did not reach the issue in *Yee* because the only question properly before the Court was whether the City of

addition, more than three years ago, the Ninth Circuit itself applied the very test Petitioners here challenge to invalidate a *residential* rent control ordinance passed by the City and County of Honolulu. *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1165-1166 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998). The Ninth Circuit expressly relied on *Richardson* as controlling in this case. *See* Pet. App., pp. 7-8, 12, 13.

In short, Petitioners' speculation about the effect of the Ninth Circuit's decision is belied by history. The rule Petitioners assert must be changed has in fact been the law for decades with none of the predicted dire consequences having materialized. At the very least, twenty years' experience with the "substantially advances" test suggests that there is little – if any – practical risk in waiting until after the factual record is more fully developed in the district court to consider reviewing this matter.

## III. REVIEW IS UNWARRANTED AT THIS TIME, GIVEN THE NINTH CIRCUIT'S DECISION TO REMAND THE CASE FOR FURTHER DEVELOPMENT OF THE FACTUAL RECORD.

The Petition should be denied as premature, given the procedural posture of this case. This is a Takings

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Escondido's mobile home rent control law effected a *physical taking* of the landlord's property. The Court concluded that the premium transfer "has nothing to do with whether the ordinance causes a physical taking." *Id.* Here, of course, there is no claim that Act 257 caused a *physical taking* of Respondent's property.

Clause case. But as the case stands before the Court, there has been no final determination whether Act 257 effects a taking. The Ninth Circuit has remanded this case to the district court for further fact-finding. Pet. App., p. 25. That fact-finding will include an evaluation by the lower court of the credibility of the evidence proffered by both parties to determine if Act 257 effects a regulatory taking. Pet. App., pp. 15-20. At this point, it is uncertain whether there will *ever* be a finding that a taking has occurred. Accordingly, the Petition is premature and asks this Court to render a potentially advisory opinion:

> "We call to mind two of the cardinal rules governing the federal courts: [one], never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied."

*Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (internal quotations omitted).

It is well settled that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) (citing *American Construction Co. v. Jacksonville, T & K, W.R. Co.*, 148 U.S. 372, 384 (1893)). As discussed above, granting review at this stage of the proceedings is premature in light of the further factual development that must occur upon remand to the district court. In addition, no circumstances are present here that warrant immediate review.

Citing *Mazurek v. Armstrong*, 520 U.S. 968 (1997), Petitioners assert that the issue presented has "present consequences" that require immediate review. Petition, p. 23. This case, however, is readily distinguishable from *Mazurek*. First, unlike *Mazurek*, this is not a case where the courts below applied a legal standard that is contrary to established precedent of this Court. *Id.* at 975 ("[T]he Court of Appeals' decision is clearly erroneous under our precedents."). Rather, both the district court and the Ninth Circuit applied a legal standard in this case that was adopted more than twenty years ago by this Court in *Agins v. City of Tiburon, supra.* Moreover, Petitioners do not contend that the lower courts in this case erred by applying the standard set forth in *Agins*; instead, they are asking this Court to overrule *Agins* and its progeny.

Second, after applying the wrong legal standard, the court of appeals in *Mazurek* had issued an injunction against implementation of the law at issue, pending the district court's resolution of the respondent's motion for preliminary injunction upon remand. *Mazurek v. Armstrong, supra*, 520 U.S. at 975. The Court noted that the injunction issued by the Ninth Circuit Court of Appeals in *Mazurek* "produced immediate consequences" for the State of Montana and created a risk that other lower courts within the Ninth Circuit might strike down similar legislation if this Court waited until a final decision was rendered before granting review. *Id.* at 975-976. Again, no such "immediate consequences" are present here. The *Agins* test is long settled authority of this Court *and* the district court must still determine upon remand whether a taking has even occurred.

Citing *United States v. General Motors*, 323 U.S. 373 (1945), Petitioners further assert that the Court should review this case now because "the decision below is 'fundamental to the further conduct of this case.' " Petition, p. 23. In *General Motors*, however, the Court decided in the eminent domain context an "issue of first impression" upon which numerous lower courts were in conflict. *United States v. General Motors, supra*, 323 U.S. at 374-375. As noted above, the standard set forth in *Agins* has been the law for more than twenty years, and contrary to Petitioners' assertions, there is no urgency to review the long-settled *Agins* rule at this stage of the case.[9]

## IV. NEITHER THE RECORD NOR THE DECISION BELOW RAISES THE SECOND QUESTION PRESENTED BY THE PETITION.

Petitioners contend that this action presents two separate questions. The second question reads as follows:

> "Does the facial constitutional validity of state legislation depend on whether a federal court predicts that it will achieve its objective?"

Petition, p. i. Neither the record nor the Ninth Circuit's opinion raises this question, and it would be inappropriate for the Court to grant the writ on this basis.

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[9] Citing cases from the Court of Federal Claims, Petitioners assert that there may be a split among the circuits on this issue. Petition, p. 10. However, even Petitioners concede that those decisions may be explained by the Federal Court of Claims' "sensitivity to limitations on the liability of the United States under the Tucker Act." *Id.*

With this question, Petitioners raise a straw man argument: Must a court predict *guaranteed* success for a statute – i.e., that it *"will achieve"* its objective – to sustain its constitutionality? Respondents never claimed that to be the standard against which Act 257 must be judged, and the Ninth Circuit expressly *rejected* it as well. Having held that the district court must consider whether Act 257 *substantially* advances a legitimate state interest, the Ninth Circuit commented:

> "Whether the price of gasoline will remain the same here is vigorously contested. The mere possibility that it will does not satisfy Chevron's burden of proving that Act 257 does not substantially further its purpose. Logically, there must be a determination of the likelihood of that possibility. *Otherwise, regulatory legislation would be unconstitutional any time it was not absolutely guaranteed to achieve its purpose.* . . . Surely the 1% chance that it would be ineffective does not, as a matter of law, mean that the statute does not 'substantially advance' its purpose. [¶] . . . Had the test been intended to require an absolute cause-and-effect relationship, the word 'substantially' would have no meaning."

Pet. App., p. 22 (emphasis added).

The second question posed by Petitioners is also too broad. As noted above, this action arose under the Takings Clause, and the Ninth Circuit's holding is limited to the Takings Clause. But Petitioners' second question raises an issue untethered to any particular provision of

the Constitution. There is no basis on this record for the Court to consider such an apparently broad-ranging issue.

## CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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In the
# Supreme Court of the United States

BENJAMIN J. CAYETANO AND EARL I. ANZAI
*Petitioners,*

v.

CHEVRON USA, INC.
*Respondent.*

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

## BRIEF OF THE STATES OF VERMONT, ALASKA, ARKANSAS, CALIFORNIA, FLORIDA, MAINE, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEVADA, NEW YORK, OHIO, OREGON, RHODE ISLAND AND WASHINGTON, AND THE TERRITORIES OF THE NORTHERN MARIANA ISLANDS, PUERTO RICO AND THE VIRGIN ISLANDS, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Does the Takings Clause authorize a court to invalidate state rent control or land use regulatory legislation on its face, without regard to whether it diminishes economic value or use or causes any physical invasion of the plaintiff's property, when the court concludes that the statute does not substantially advance a legislative purpose?

2. Does the facial constitutional validity of state legislation depend on whether a federal court predicts that it will achieve its objective?

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## INTEREST OF THE AMICI CURIAE

State governments, through their legislative and executive branches and through their municipal governments, are primarily responsible for maintaining the delicate balance between the interests of the public and the rights of individual property owners. As the Court recognized when it first heard a constitutional challenge to a zoning ordinance, land use regulation is a dynamic area of the law. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) ("[W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands."). New patterns of growth and development, greater understanding of environmental harms, and a rapidly changing economy require the states to respond creatively and, on occasion, to experiment. The states are vitally interested in protecting their ability to legislate in this area free from the kind of judicial second-guessing authorized by the court below.

The decision of the Ninth Circuit in this case requires a court to invalidate land use or rent control legislation under the Takings Clause if the court, after its own independent review, concludes that the challenged law will not accomplish the legislature's intended goal. The *amici* states and territories routinely enact such legislation to respond to constantly changing economic pressures and environmental conditions. State legislatures need flexibility and discretion to craft reasonable solutions to contemporary problems. Indeed, the Court has long recognized that "[l]egislative bodies have broad scope to experiment with economic problems," *Ferguson v.*

*Skrupa*, 372 U.S. 726, 730 (1963), and has traditionally afforded states substantial discretion in exercising their police powers to further the public interest. The decision below, if permitted to stand, would significantly restrict the states' ability to regulate land use by requiring courts to evaluate, not the reasonableness of a regulation, but whether the legislature made the "correct" policy choice to respond to a particular problem. *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("States are not required to convince the courts of the correctness of their legislative judgments.").

## REASONS FOR GRANTING THE PETITION

### I. The Ninth Circuit's decision to subject land use regulation to heightened scrutiny raises an important issue for the states and invites expensive and intrusive legal challenges to ordinary social and economic legislation.

1. Without question, the Takings Clause and the Due Process Clause, as well as analogous provisions of most state constitutions, impose substantive and procedural limits on state regulatory measures. The Due Process Clause protects against arbitrary and irrational government action; the Takings Clause requires the government to provide compensation to an affected property owner when the government effects a physical taking or imposes such a burden on the use of property that it is akin to a physical taking. With the exception of physical takings in the form of exactions, however, this Court has not held that the Takings Clause requires courts to subject land use regulations to any form of heightened scrutiny. *See*

*City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 703 (1999) (declining to extend the "rough proportionality" test for physical exactions to other land use regulations); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 242 (1984) (holding that whether statutory exercise of eminent domain power "'will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature rationally could have believed that the [Act] would promote its objective'") (quoting *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981)) (alteration in original).

The Ninth Circuit has unwisely chosen to depart from this Court's precedent and impose a stringent standard of review on land use regulations. Pet. App. 7 (holding that heightened scrutiny applies to land use regulations). That holding alone threatens to undermine the states' ongoing efforts to regulate land use in ways that benefit the public welfare and protect the reasonable expectations of property owners. The Court has recognized, albeit in a different context, that subjecting state laws to heightened scrutiny, what is sometimes termed "intermediate scrutiny," "require[s] searching judicial scrutiny of state law with the attendant likelihood of invalidation." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). This heightened standard of review represents a "considerable . . . intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.*

Even more troubling, however, is the content the Ninth Circuit gave to its heightened standard of review. The court specifically ordered the district court, on remand, to assume the legislative role, weigh

the competing opinions of expert economists, and decide for itself whether the challenged rent control statute will be effective. Pet. App. 17-20, 25. In so doing, the Ninth Circuit ignored this Court's repeated caution that "it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 470. To borrow this Court's language, the Ninth Circuit's holding "goes too far" in authorizing courts to override legislative decisions about social and economic policy. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). And because virtually every government regulatory action can be attacked as a taking, the influence of the decision is certain to extend beyond land use and rent control measures.

2. A close look at the decision below illustrates the manner in which the Ninth Circuit's approach to takings law intrudes on legislative policy choices. As the Ninth Circuit recognized, Hawaii passed Act 257 in response to a difficult problem: "the highly concentrated gasoline market in Hawaii and the resulting high cost of gasoline to consumers." Pet. App. 3; *see also* Pet. App. 43 (district court opinion acknowledging "strongly felt concerns of the legislature that Hawaii's consumers are paying too much for gasoline"). Economists and other experts hold differing views on whether rent control regulations are a sound form of economic policy. *Compare, e.g.*, Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brooklyn L. Rev. 729 (1988), *with* Kenneth K. Baar, *Response: Would the Abolition of Rent Control Restore a Free Market?*, 54 Brooklyn L. Rev. 1231 (1989); *see generally* Jeffrey J. Minton, *Rent Control: Can and Should It Be Used to Combat*

*Gentrification?*, 23 Ohio N.U. L. Rev. 823 (1997) (analyzing rent control statutes in light of different economic models).

In this case, two contrasting policy viewpoints on the issue were provided by the expert economists who supplied affidavits for the state and Chevron, respectively. The state's expert concluded that the Act will benefit consumers by encouraging more dealers to stay in business, which in turn will lead to a greater supply and lower prices at the pump. Pet. App. 15-16. Chevron's expert disagreed, opining that the law will discourage oil companies from building new gasoline stations or maintaining old ones, thus further concentrating Hawaii's gasoline market and ultimately leading to higher prices. *Id.* at 16-17. The conflicting conclusions of these experts reflect significantly different policy views of the relevant market and the likely reactions of gasoline dealers and oil companies to the legislation. *Id.*

As these expert opinions suggest – and as is so often the case – the Hawaii Legislature could not fashion a response to the problem of high gasoline prices with the comfort of knowing that its chosen solution was certain to work. There is precious little certainty in the area of economic regulation. As Justice Frankfurter once observed, "[m]ost laws dealing with economic and social problems are matters of trial and error." *American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538, 553 (1949) (Frankfurter, J., concurring). Rather than absolving its responsibility in the face of this uncertainty, however, the legislature made a reasonable policy choice that is reflected in Act 257. This is the type of

legislative judgment to which courts traditionally and appropriately defer.

The Ninth Circuit, however, pointedly declined to follow this usual rule of deference, and instead concluded that Act 257 was subject to heightened scrutiny under the Takings Clause. Accordingly, the district court on remand was instructed to determine, based on the competing opinions of the expert witnesses, whether Act 257 will succeed in lowering gasoline prices for consumers. Pet. App. 20, 25. The court recognized that the district court judge, like the legislature, could do no more than make an informed prediction about the likely success of the Act. *See id.* at 18 ("[a]dmittedly, these are questions of *predictive fact*") (emphasis added). But nowhere did the Ninth Circuit explain why the district court's judgment on the issue should be given greater weight than the judgment of the Hawaii Legislature.

By requiring judges to substitute their judgments for those of the legislature, the Ninth Circuit's decision has a significant impact on the authority of state legislatures to make social and economic policy choices. Like the Hawaii Legislature here, state legislatures routinely face problems to which there are a range of possible responses, any one of which may work – and none of which comes with a guarantee. "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665

(1994).[1] Elected representatives rely on a wide range of evidence and on their experience and common sense to evaluate the conflicting views of interest groups, experts, and ordinary citizens. When a legislature chooses a policy that falls within the range of reasonable options, that decision should be respected by the courts. It is wholly inappropriate for a court to reweigh conflicting evidence and opinions in an effort to predict the success of a particular piece of legislation.[2] *See Hawaii Housing Auth. v. Midkiff*, 467

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[1] *Turner Broadcasting* involved a challenge to the FCC's must-carry rules for cable systems, which the Court concluded were subject to intermediate scrutiny under the First Amendment. 512 U.S. at 662-63. The Court's holding in *Turner I* is significant for two reasons. First, even in the First Amendment context, the Court nonetheless afforded "substantial deference" to the "predictive judgments" of Congress and stressed that the Court's "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own." *Id.* at 666. It is striking that the Ninth Circuit declined to extend similar deference to the Hawaii Legislature in reviewing an economic regulation that does not implicate fundamental constitutional rights. Second, the scope of the remand in *Turner I* illustrates the far greater burden placed on the government to defend laws and agency actions subject to heightened scrutiny. Although the legislature "compiled an extensive record in the course of reaching its judgment," *id.* at 669 (Blackmun, J., concurring), the Court nonetheless remanded the case for the government to present additional evidence and the district court to make findings regarding the interests at stake, the actual effects of the rules, and the possibility of less restrictive alternatives. *Id.* at 668. The Ninth Circuit would impose this type of substantial evidentiary burden on the government in the context of any regulatory takings claim.

[2] It is telling that the single case cited by the Ninth Circuit in support of requiring the district court to resolve this matter based on "predictive facts" is an access to records claim brought under

U.S. at 243 ("our cases make clear that empirical debates over the wisdom of takings – no less than debates over the wisdom of other kinds of socioeconomic legislation – are not to be carried out in the federal courts").

In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), a case involving a similar state regulation of the gasoline market, this Court specifically refused to consider the "ultimate economic efficacy of the statute" in ruling on its constitutionality. *Id.* at 124-25. In response to the gasoline shortage in 1973, Maryland passed a law prohibiting producers and refiners from operating company-owned stations. The goal of the statute was to correct inequities in gasoline distribution – and therefore pricing – among independent and company-owned stations. The producers and refiners argued that the statute violated due process because "it [would] frustrate rather than further the State's desired goal of enhancing

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the Freedom of Information Act (FOIA). Pet. App. 18-20 (citing *Washington Post Co. v. United States*, 865 F.2d 320 (D.C. Cir. 1989)). FOIA affords no deference to agency decisions but rather "requires courts to review *de novo* agency claims of exemption, and . . . places on the agency the burden of defending its withholding of information." *CIA v. Sims*, 471 U.S. 159, 182 (1985) (Marshall, J., concurring) (citing 5 U.S.C. § 552(a)(4)(B)). In light of the burden imposed on the agency, *Washington Post* held that the district court could not accept the agency's conclusory affidavits regarding the possible effects of public disclosure, but instead had to weigh the competing evidence put forward by both parties. 865 F.2d at 326. Given the unusual posture of a FOIA claim, the holding in *Washington Post* was proper. But that holding has no bearing on the role of a court reviewing the validity of state legislation, which is presumed to be valid and constitutional.

competition." *Id.* at 124. The Court declined to engage in this debate, noting that an argument based "on an evaluation of the economic wisdom of the statute . . . cannot override the State's authority 'to legislate against what are found to be injurious practices in their internal commercial and business affairs.'" *Id.* (quoting *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 (1949)).

Here, the task that the Ninth Circuit assigned the trial court will inevitably draw the courts into the realm of policymaking and speculation. What the lower court called "predictive facts" are not facts at all, but predictions, opinions – even educated guesses. To reach a decision on remand, the district court ultimately would have to choose between competing economic models, neither of which is a "fact" that can be "proven" in the ordinary sense. *See* Pet. App. 20 ("to determine whose predictions are more accurate," the district court must gain a "better understanding of the competitiveness of the market for the sale and purchase of lessee dealer rights and the elasticity of demand for gasoline"). This Court long ago recognized the danger of transforming economic theories into constitutional principles. *See, e.g., Ferguson v. Skrupa*, 372 U.S. at 730, 732 ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.").

3. One prediction that can be safely made, however, is that the decision below, if permitted to stand, will require states and local governments to

defend themselves against more numerous and more expensive challenges to land use and rent control regulations. *Cf. Eastern Enter., Inc. v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring) (recognizing that takings law is "one of the most difficult and litigated areas of the law"). More numerous, because the Ninth Circuit has significantly expanded the universe of regulations that are subject to Takings Clause challenges. In its decision, the Ninth Circuit implicitly recognized that Chevron may prevail on remand even though (1) Chevron made no showing that it was denied the economic viability of its property (and in fact, the Act permitted Chevron to charge more than it would otherwise have charged under its own rental program), *see* Pet. App. 25, and (2) the Hawaii Legislature had a rational basis for concluding that the Act would reduce gasoline prices for consumers. *Id.* at 7, 13. Expressed in more general terms, the Ninth Circuit's new Takings Clause rule goes as follows: where a legislature makes a rational policy decision to regulate land use or rents in a manner that imposes a relatively insignificant economic burden on the property owner, a Takings Clause challenge may nonetheless succeed if a property owner can show to a court's satisfaction that the regulation may not fulfill its intended purpose. As reasonable experts may be found to oppose virtually any economic or land use regulation, such a rule is nothing if not an invitation to litigation.

There is also little doubt that state and local governments will bear new and costly burdens in defending Takings Clause challenges under this rule. *Cf. City of Boerne*, 521 U.S. at 535 (noting the "heavy litigation burden" that RFRA's heightened scrutiny

would impose on the states). The Ninth Circuit has dramatically altered the level and type of proof required to support the constitutionality of land use regulation. *See, e.g., Heller v. Doe*, 509 U.S. 312, 319 (1993) (recognizing that, while rational-basis review "does not require the State to place any evidence in the record," an "extensive evidentiary showing" is required for a statute to survive heightened scrutiny). Presumably it no longer suffices for the state, in the face of conflicting evidence from the property owner, to rely on an ordinary legislative or administrative record that demonstrates a reasoned basis for the challenged regulation. Nor is it likely that a state can overcome a takings challenge prior to trial by presenting expert testimony that supports the reasonableness of the regulation. By eliminating these two options, the Ninth Circuit has made it nearly impossible for a state to prevail in pretrial proceedings, such as a motion for judgment on the pleadings or for summary judgment. As long as a property owner has an expert who will testify that a regulation will not achieve its intended purpose – as noted above, virtually a given in any case – the state must go to trial and present its own evidentiary case. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (noting, in context of ballot access restrictions, that requiring state to provide empirical proof of predicate for legislation "would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State").

## II. This case presents an opportunity for the Court to resolve an unsettled and important issue in takings law that has confused the lower courts and caused uncertainty for state and local governments.

In *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), the Court in dicta stated for the first time that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." Some years later, Justice Scalia, speaking for the Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 (1987), noted that "[o]ur cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." More recently, Justice Kennedy has described the "substantially advances" test as existing "in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the government's power to act." *Eastern Enter., Inc. v. Apfel*, 524 U.S. at 545 (Kennedy, J., concurring). And just two terms ago, the Court in *City of Monterey v. Del Monte Dunes* acknowledged that it has not provided "a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions." 526 U.S. at 704.

This brief chronology illustrates two related and unsettled questions that are directly presented in this

case. First, despite the oft-repeated language in *Agins*, several members of the Court have questioned whether a means-end test, such as the "substantially advances" test, is or should be part of a Takings Clause analysis. Given the Ninth Circuit's ruling that Chevron has not been denied the economically viable use of its property, this case poses the as-yet-unanswered question whether a government regulation effects a taking *solely* because a court concludes that the regulation does not substantially advance a legitimate state interest. Second, if the "substantially advance" test is a proper part of takings jurisprudence, the Court has the opportunity here to establish the degree of scrutiny required under that test – or, put another way, to decide how closely the courts should analyze the "fit" between a regulation and its intended purpose.

A sampling of lower court decisions in this area reveals the degree of confusion that has taken hold and the consequent need for clarification by the Court. The California Supreme Court has struggled with the required means-end relationship under the Takings Clause, leading one justice specifically to ask this Court to decide whether "a means-ends test [should] be used to determine whether a taking has occurred, or instead should means-end testing remain within due process jurisprudence." *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1013 (Cal. 1999) (Kennard, J. concurring). Two state supreme courts have concluded that the Due Process Clause, not the Takings Clause, should govern review of the rationality of land use regulations. *See Brunelle v. Town of South Kingston*, 700 A.2d 1075, 1083-84 n.5 (R.I. 1997); *Mission Springs Inc. v. City of Spokane*, 954 P.2d 250, 257-58 (Wash. 1998). The Ninth Circuit,

however, has taken the opposite approach, ruling that due process challenges to the validity of land use regulations are "preempted" by the Takings Clause. *See Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir. 1996). Other courts entertain both types of claims, but apply the same standard to each. *See, e.g., Omya, Inc. v. Town of Middlebury*, 758 A.2d 777, 780 (Vt. 2000).

Not surprisingly, courts have also had trouble giving content to the means-end analysis under the Takings Clause. The Massachusetts Supreme Judicial Court noted its confusion in *Steinbergh v. City of Cambridge*, 604 N.E. 2d 1269 (1992), stating that the substantially advance test "*may express* a higher standard at least in certain circumstances than the rational basis test . . . . *It may be* that the degree of substantiality required varies depending on the character of the state's interest" in relation to the reduction in property value. *Id.* at 1276 (emphasis added). The *Steinbergh* court ultimately concluded, based on the legislative record, that the challenged rent control regulation did substantially advance a legitimate state interest – thus apparently, but not explicitly, equating the "substantially advance" test with the ordinary rational basis test. *Id.* at 746.

The New York Court of Appeals at one point took a very different approach, striking down a rent control provision under the Takings Clause after describing its "fundamental defect" as "no substantial advancement of a legitimate state interest and 'close causal nexus' required for the challenged regulatory enactment to survive scrutiny." *Manocherian v. Lenox Hill Hosp.*, 643 N.E. 2d 479, 487 (1994). But New York's high court has since retreated from this level of heightened

scrutiny, concluding that *Del Monte Dunes* limited the "essential nexus" test to exactions. *See Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971, 974-75 (1999) (describing the conflicting views as to the reach of this Court's holdings in *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). In *Bonnie Briar*, the court found that the challenged regulation "easily qualifies" as valid because it "bears a reasonable relation to the legitimate objectives stated." *Id.* at 976.

Notably, the owners of a Maryland property have recently asked this Court to review a decision of the Fourth Circuit upholding a local land use ordinance. In *Greenspring Racquet Club, Inc. v. Baltimore County*, the Fourth Circuit relied on the legislative record to conclude that the challenged zoning restrictions (which impose new height and density limits in certain areas) "substantially advance a legitimate state interest in controlling dense development in areas located near rural development zones." 232 F.3d 887, 2000 WL 1624496, at *5 (4th Cir. 2000) (unpublished table decision). The landowners now claim that the Fourth Circuit's review of the zoning regulations was too deferential, and that the lower court should have applied some form of heightened scrutiny to the challenged regulation. Petition for Writ of Cert. at 13, *Greenspring Racquet Club*, No. 00-1227. Although the *amici* do not support the petition in *Greenspring*, it is nonetheless striking that property owners, as well as state governments, are expressing confusion and uncertainty about the standard applied to regulatory takings claims. *See id.* at 15 ("It is imperative for the Court to address this issue directly and either clarify

the standards of the 'substantially advance' test of *Agins* or overrule *Agins* . . . .").

The conflicting and inconsistent approaches taken by the lower courts create an uncertain legal climate that hampers planning efforts, increases litigation costs, and, in some cases, encourages inappropriate forum shopping. The consequences are felt most directly by the states and their political subdivisions, because in our federal system, the states "have traditional and primary power over land and water use." *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. ___ (2001), slip op. at 13. *Amici* urge the Court to take this opportunity to bring coherence to this area of the law.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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In The

# Supreme Court of the United States

BENJAMIN J. CAYETANO and EARL I. ANZAI,

*Petitioners,*

v.

CHEVRON USA, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND INTERNATIONAL CITY/ COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Does the Takings Clause authorize a court to invalidate state rent control or land use regulatory legislation on its face, without regard to whether it diminishes economic value or use or causes any physical invasion of the plaintiff's property, when the court concludes that the statute does not substantially advance a legislative purpose?

2. Does the facial constitutional validity of state legislation depend on whether a federal court predicts that it will achieve its objective?

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## BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND INTERNATIONAL CITY/ COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

*Amici Curiae* Council of State Governments, National Association of Counties, National League of Cities, International Municipal Lawyers Association, and International City/County Management Association respectfully submit this brief in support of petitioners, Benjamin J. Cayetano and Earl I. Anzai.[1]

## INTEREST OF *AMICI CURIAE*

*Amici* collectively represent thousands of members, including states, counties, municipalities, and their officials and legal advisors. *Amici*'s members are responsible for drafting, passing, administering, and defending land use regulations in thousands of jurisdictions nationwide,

[1] Pursuant to this Court's Rule 37.2(a), letters of consent from both parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief, other than a contribution toward the printing costs by the Institute for Local Self-Government, a California non-profit entity that is the research and education affiliate of the California League of Cities, a member of *amicus* National League of Cities.

and thus have a manifest interest in this regulatory takings case.

*Amici* have particular concerns about the Ninth Circuit's decision in this case, which applies heightened means-ends scrutiny to a land use regulation to determine just compensation liability under the Takings Clause. *Amici*'s members in the nine states and nearly two thousand localities in the Ninth Circuit are concerned about the immediate chilling effect this decision will have on state and local efforts to address emerging land use problems by reasonable regulation. They are also concerned about spending their limited resources on defending challenges to existing regulation under a level of scrutiny unprecedented in the modern era.

*Amici*'s members in the states of California and Washington are concerned that the Ninth Circuit's decision creates a conflict between state and federal courts in the same jurisdiction, thus raising the additional problem of forum-shopping and of planning in light of conflicting standards that may be applied to the same legislation.

*Amici*'s members nationwide are concerned about the deep conflict that has now spread to two United States Courts of Appeals, four state supreme courts, and the Court of Federal Claims, which have formulated widely varying approaches in attempting to construe this Court's ambiguous precedent in this area. *Amici* believe that the uncertainty and confusion caused by this conflict burdens all state and local governments, and that this Court could lift that burden by granting the petition in this case and providing definitive guidance.

## REASONS FOR GRANTING THE PETITION

### I. The State And Local Governments And Officials Represented By *Amici* Urgently Need Clarification Whether A Land Use Regulation's Failure To Survive Heightened Means-Ends Scrutiny Can Trigger Liability For Just Compensation Under The Takings Clause.

The lower court's decision in this case has caused immediate practical problems for *amici*'s members in the Ninth Circuit responsible for drafting, passing, administering, and defending land use and rent control regulations. Set against other conflicting lower court decisions and this Court's own ambiguous pronouncements, the decision has also increased uncertainty among all of *amici*'s members.

The court below held that a gas station rent control regulation may on its face effect a taking of private property requiring just compensation if there is a sufficient chance that it will not achieve its stated goal of controlling retail gas prices – even if the regulation allows a reasonable return on investment. *See* Pet. App. 23-24. The court then indicated the seriousness with which it viewed the requirement that the rent control provision "substantially advance" the goal of controlling gas prices by remanding for a full trial on the issue whether the provision met this requirement, anticipating further testimony by economic experts from both sides. *See* Pet. App. 24.

As detailed below, this disposition places the Ninth Circuit in conflict with the Fourth Circuit, the highest courts of California, New York, Rhode Island, and Washington, and the Court of Federal Claims. For states and

localities that are not in any of those jurisdictions, this conflict produces uncertainty as to which standard will apply to their land use regulations. For the nine states and almost two thousand municipalities that are located in the Ninth Circuit, the decision both immediately chills efforts to address emerging local land use problems through legislation, and requires preparation for challenges to existing legislation under means-ends scrutiny unprecedented in the modern era. For the states of California and Washington and their localities, the conflict creates the additional complication and unfairness of forum shopping, since their state and federal courts will now be applying different federal constitutional rules. Thus, for all of the states and localities represented by *amici*, the Ninth Circuit's decision creates an urgent need for this Court to clarify the law in this area.

### A. States and localities need to know whether a means-ends test forms any part of the determination of just compensation liability, a matter of disagreement separating the Ninth Circuit from the Rhode Island and Washington Supreme Courts and the Court of Federal Claims.

The Ninth Circuit's decision in this case that just compensation liability under the Takings Clause may be triggered by a land use regulation's failure to meet a means-ends test squarely conflicts with decisions of the Rhode Island and Washington Supreme Courts and the Court of Federal Claims:

- In *Brunelle v. Town of South Kingston*, 700 A.2d 1075 (R.I. 1997), the Rhode Island Supreme Court specifically rejected the trial court's conclusion that a regulation could effect a taking if it did not substantially advance a legitimate state interest. To the contrary, an examination of this Court's precedent convinced Rhode Island's highest court that "the arbitrariness or capriciousness of a particular state action is properly examined under the light of the Fourteenth Amendment due process clause and not the Fifth Amendment takings clause." *Id.* at 1083 n.5.

- In *Mission Springs, Inc. v. City of Spokane*, 954 P.2d 250, 261 (Wash. 1998), the Washington Supreme Court held that a claim of "[a]rbitrary or irrational refusal or interference with processing a land use permit" was properly analyzed under the Fourteenth Amendment Due Process Clause rather than the Fifth Amendment Takings Clause. That holding produced a dissent by Justice Talmadge arguing that the Ninth Circuit's decisions in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) and *Macri v. King County*, 110 F.3d 1496 (9th Cir. 1997), required such claims to be treated under the Fifth Amendment Takings Clause. *See id.* at 985 n.14 (Talmadge, J., dissenting).

- Most recently in *Bamber v. United States*, 45 Fed. Cl. 162, 166 (1999), the Court of Federal Claims reaffirmed its position that a claim that a government action failed to substantially advance a legitimate state interest "is not a takings claim." The court commented that "this alternative takings analysis, first alluded to in *Agins* [*v. City of Tiburon*, 447 U.S. 255, 260 (1980)], has not had a fruitful life," *id.* at 165, and suggested that more recent decisions of this Court confined *Agins* narrowly to "circumstances in which regulators attempt, without any real basis for doing so, to create

public access to privately held real property." *Id.* at 165-66.

The conflict between the Ninth Circuit and these lower courts on the issue whether means-ends scrutiny has any place in the Takings Clause has produced uncertainty among many of the state and local officials represented by *amici*, most pointedly in the state of Washington where there is now a conflict between state and federal courts in the same jurisdiction. Only a definitive statement from this Court can put an end to this uncertainty.

### B. States and localities need to know whether a heightened means-ends test is properly applied to determine just compensation liability, a matter of disagreement separating the Ninth Circuit from the Fourth Circuit, the California Supreme Court, and the New York Court of Appeals.

Although the Ninth Circuit, the Fourth Circuit, and the highest courts of California and New York all agree that Takings Clause analysis includes a means-ends test, they radically differ as to the appropriate standard for that means-ends scrutiny:

- In *Greenspring Racquet Club, Inc. v. Baltimore Cty.*, 232 F.2d 887, 2000 WL 1624496, **5 (4th Cir. Oct. 31, 2000), *petition for cert. filed*, No. 00-1227 (January 29, 2001), the Fourth Circuit held that there was virtually no role for independent judicial assessment of the relationship of land use regulations to their asserted purposes, concluding that "[w]hen statements by local lawmakers set out legitimate reasons for imposing . . . restrictions on property . . . , there can be no

claim in federal court that the law fails to substantially advance a legitimate purpose." *Id.* at **5.

- In *Santa Monica Beach, Ltd. v. Superior Ct.*, 968 P.2d 993 (Cal. 1999), the California Supreme Court held that the appropriate standard for a Takings Clause means-ends test was not a "heightened intermediate scrutiny standard," but a standard inquiring only whether the challenged regulation is "arbitrary," which should not limit itself to the stated goals of the regulation. *See id.* at 1004. This portion of the court's holding drew separate, pointed dissents from Justices Baxter, Chin, and Brown. *See id.* at 1026-1029 (Baxter, J., dissenting); *id.* at 1036-1038 (Chin, J., dissenting); *id.* at 1040-1042 (Brown, J., dissenting). It also drew a concurrence from Justice Kennard specifically requesting this Court to address the issue whether "outside the *Nollan/Dolan* context . . . a means-end test [should] be used to determine whether a taking has occurred, or instead [whether] means-end testing [should] remain within due process jurisprudence." *Id.* at 1013 (Kennard, J., concurring).

- In *Bonnie Briar Syndicate v. Mamaroneck*, 721 N.E. 2d 971 (N.Y. 1999), the Court of Appeals of New York rejected the landowner's argument that a zoning law could pass Takings Clause review only if the government could show a "close causal nexus" between its objectives and the law's operative provisions. Rather, it concluded that the law would pass means-ends scrutiny if it bore "a reasonable relationship to the legitimate objectives stated within [the] law," *id.* at 976, a lenient standard since it is "not for this Court to determine if, in regulating land use, the rezoning determination was more stringent than one might reasonably conclude was necessary to further public objectives." *Id.*

By contrast, in the instant case the Ninth Circuit remanded for a full trial of the issue whether the challenged rent control provision will further the stated purpose of the provision, namely to control retail gas prices. *See* Pet. App. 27. Thus, in direct conflict with the California Supreme Court, the Ninth Circuit requires the Takings Clause means-ends test to consider only those ends explicitly stated by the legislature. Additionally, in conflict with the Fourth Circuit and the New York Court of Appeals as well as the California Supreme Court, the Ninth Circuit does not use a deferential means-ends standard, but requires trial courts to admit detailed evidence from both parties predicting the success or failure of the challenged provision to achieve its stated ends, and then to resolve any conflicts in the evidence presented with no apparent deference to the government. *See id.* (directing the District Court to resolve factual issues raised by conflicting evidence as to "whether incumbent dealers will capture a premium based on the increased value of their leaseholds due to the imposition of a maximum permissible regulated rent, thereby depriving new dealers and consumers from reaping the benefits of Act 257," and as to "whether oil companies will raise the wholesale price of fuel and thereby unilaterally offset the benefits of the Act").

This aspect of the ruling below gains the support of only two of the three panel members; Judge Fletcher, concurring in the judgment, specifically rejects the majority's embrace of heightened scrutiny, arguing that its holding "undermines or even contradicts [this Court's] decisions in ordinary rent control cases such as *Pennell* [*v.*

*City of San Jose*, 485 U.S. 1 (1988)], and *Bowles v. Willingham*[, 321 U.S. 503 (1944)], as well as threatens its decisions in price control cases such as *FCC v. Florida Power*[ *Corp.*, 480 U.S. 245 (1987)] and the *Permian Basin Area Rate Cases*[, 390 U.S. 747 (1968)]." *Id.* at 1047 (Fletcher, J., concurring in the judgment). Nonetheless, the ruling below is now binding precedent in the Ninth Circuit, and burdens the nine states and hundreds of localities in the Ninth Circuit's jurisdiction – particularly California and its localities, which now must face conflicting approaches in their state and federal courts. Only guidance from this Court can resolve that conflict and the uncertainty facing thousands of other governmental bodies represented by *amici*.

## II. This Case Is The Appropriate Vehicle For Resolving The Conflict Between The Lower Courts And Providing Guidance On Whether Means-Ends Scrutiny Has Any Role In Determining Just Compensation Liability Under The Takings Clause.

This Court is unlikely to find a better case to use as a vehicle for resolving the conflict between lower courts on the role of means-ends analysis under the Takings Clause. The issue has been developed extensively in the lower courts, and the conflicts will persist without further guidance from this Court. The Ninth Circuit's decision now creates, for the first time, a conflict between state and federal courts in California and Washington, producing the complication and unfairness of forum-shopping. The decision below cleanly frames the constitutional issue, and produces immediate adverse consequences not only for the petitioner but also for the nine states and almost

two thousand localities whose land use regulations must now face heightened means-ends scrutiny under the Takings Clause.

### A. The well-developed conflict in the lower courts has now reached a critical forum-shopping stage and will persist without this Court's guidance.

In five key cases, this Court has sent ambiguous, conflicting signals about the role of means-ends scrutiny under the Takings Clause. Together, these cases have generated confusion in the lower courts that will persist and spread without further guidance from this Court.

- In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court mentioned for the first time the possibility that a land use provision might effect a taking if it "[did] not substantially advance legitimate state interests"; but this remark was dictum, and cited for its only support *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928), a case decided under the Fourteenth Amendment Due Process Clause rather than the Fifth Amendment Takings Clause.

- In *Nollan v. California Coastal Commission*, 483 U.S. 825, 834-837 (1987), this Court cited *Agins* in support of the "essential nexus" test it crafted for exactions; but the essential nexus test turns out not to be a means-ends test at all, as it instead compares two ends – the purpose supporting a land use restriction, and the purpose of an exaction on which relaxation of the restriction is conditioned. *See id.* at 837 ("unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use").

- In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), this Court further developed *Nollan*'s exactions jurisprudence; but it conspicuously shifted the rationale underlying the exactions doctrine from the *Agins* means-ends test to the "well-settled doctrine of 'unconstitutional conditions,' " under which "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Id.* at 385.

- In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a plurality of this Court concluded that the Coal Industry Retiree Health Benefit Act of 1992 violated the Takings Clause; but five members of the Court concluded that economic legislation should be reviewed under the Due Process Clause rather than the Takings Clause, *see id.* at 545 (Kennedy, J., concurring in the judgment); *id.* at 554 (Breyer, J., dissenting), and Justice Kennedy's pivotal opinion specifically noted that the means-ends analysis set out in *Agins* "is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the Government's power to act." *Id.* at 545 (Kennedy, J., concurring in the judgment)

- Finally, in *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687 (1999), this Court concluded that the issue of means-ends scrutiny under the Takings Clause was not properly before it because the petitioner had itself formulated jury instructions containing a means-ends test, *see id.* at 704; but the Court then sounded dissonant notes of caution and reassurance, warning that it had never provided "a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance a

> legitimate public interest outside the context of required dedications or exactions," *id.*, while noting that "the trial court's instructions are consistent with our previous general discussions of regulatory takings liability." *Id.* In their separate opinions, Justice Scalia and Justice Souter both specifically reserved the question whether failing a means-ends test should ever trigger just compensation liability. *See id.* at 732 n.2 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 753 n.12 (Souter, J., concurring in part and dissenting in part).

The lower courts, faced with these five wavering signposts, have understandably been unable to come to any agreement on the proper direction of means-ends jurisprudence under the Takings Clause. By now, two United States Courts of Appeals, four state supreme courts, and the Court of Federal Claims have formulated varying approaches, often over dissents suggesting the close and difficult nature of the issues.

With the Ninth Circuit's decision below, the conflict has reached a critical stage, because the states of Washington and California and their localities now must deal with different versions of the Takings Clause in state and federal court. Thus, there is at this point nothing to be gained from awaiting additional development of the issue, and every reason to provide immediate further guidance.

**B. The decision below has cleanly framed the constitutional issue and produces immediate adverse consequences for petitioner and the other eight states and nearly two thousand localities in the Ninth Circuit.**

The chief import of the Ninth Circuit's decision in this case is to set out a novel strict standard to judge the constitutionality both of the rent control legislation at issue in this case and of land use regulation throughout nine states in the western third of this nation. That decision was rendered in the context of litigation that had come to focus on the precise issue of the proper role of means-ends scrutiny under the Takings Clause.

In the District Court, the parties in this case submitted cross motions for summary judgment, agreeing that what divided them was a question of law concerning the use of means-ends scrutiny under the Takings Clause. The District Court denied the petitioner's motion and granted the respondent's, concluding that the Takings Clause required a level of heightened means-ends scrutiny which the rent control provisions could not pass.

On appeal, the Ninth Circuit affirmed the District Court's ruling that the Takings Clause required heightened means-ends scrutiny of land use legislation, and thus cleanly framed the constitutional issue for review in this Court. However, in spite of the fact that neither party had raised the existence of genuine issues of material fact in the District Court, the court then proceeded to decide that there were factual issues left under the strict standard it had set, and remanded for trial. *See* Pet. App. 14 n. 5, 27.

There is absolutely no reason that the remand order appended to the Ninth Circuit's judgment should insulate its novel holding from review in this Court. This is not a state court case in which a final judgment of the court below is a prerequisite to jurisdiction. Rather, this is a petition to review a case in a federal court of appeals, and this Court has unquestioned plenary jurisdiction to review such cases "[b]y writ of certiorari granted upon a petition of *any party to any civil or criminal case, before or after rendition of a judgment or decree.*" 28 U.S.C. § 1254(1) (emphasis added). Recognizing this authority, this Court has granted review of judgments containing remand orders in numerous cases. *See, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *United States v. General Motors*, 323 U.S. 373, 377 (1945).

This case clearly warrants exercise of this Court's undoubted authority to review the Ninth Circuit's judgment at this juncture. It is true that petitioner State of Hawaii could conceivably prevail on remand, but only after being forced to develop and present voluminous evidence about the economics of land markets and wholesale and retail gasoline markets in that state. The burden of that further litigation represents an immediate adverse consequence of the Ninth Circuit's judgment on petitioner. More importantly, such a victory on remand would not affect the status of the Ninth Circuit's holding as binding precedent on federal courts in nine states. Rather, it would only prevent this Court from reviewing that holding, chilling state and local legislation for an indefinite period until another appropriate case arose. In

the interest of the thousands of state and local governments and officials that *amici* represent, *amici* respectfully request this Court not to postpone indefinitely consideration of this important issue, but to grant the petition in this case and provide much needed guidance to the lower courts.

## CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

Respectfully submitted,

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No. 00-1198

In The

# Supreme Court of the United States

BENJAMIN J. CAYETANO and EARL I. ANZAI,

*Petitioners,*

v.

CHEVRON USA, INC.,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO AS AMICUS CURIAE SUPPORTING PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF INTEREST OF AMICUS CURIAE

Under Supreme Court Rule 37.4, amicus curiae City and County of San Francisco, joined by 45 California cities ("the cities"), submit this brief in support of the petition for a writ of certiorari. This case involves a challenge based on the Takings Clause of the Fifth Amendment to the right of democratically elected legislatures to establish economic and social policy. Seeking to reduce retail gasoline prices, the State Legislature of Hawaii limited the rent oil companies may charge dealer/lessees to use oil company-owned service stations. The Ninth Circuit Court of Appeals found that federal courts have the power to strike down such statutes as "takings" where the court determines, based on its own weighing of evidence presented in court, that the regulation will not be effective.

Each of the amici cities is within the jurisdiction of the Ninth Circuit, and is therefore subject to that court's decision in this case. Because the Ninth Circuit's transfer of power to formulate social and economic policy from legislatures to the courts could have pervasive implications for local regulatory authority under the police power, this Court should consider the cities' viewpoint.

## INTRODUCTION

At issue in this case is which branch of government determines land use policy: elected legislatures or courts. Language in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) has led to this controversy. In that case, the Court held that courts are empowered to find that a regulation effects a "taking" of property under the Takings Clause of

the Fifth Amendment if the regulation fails to "substantially advance legitimate state interests." *Id.* at 260. This Court has provided reasonably clear signals as to the meaning of this phrase. Nevertheless, numerous lower court decisions show substantial disagreement as to the scope of judicial review under the "substantially advances" standard. This case presents an ideal opportunity for the Court to settle the meaning of this test and provide guidance to the lower courts and government agencies at every level engaged in the regulation of land use.

In the two decades since *Agins*, this Court and the lower federal and state courts have interpreted the "substantially advances" takings test to require either: (1) deferential judicial review of land use regulations of other branches of government – a test akin to "rational basis"; or (2) nondeferential review – known as "heightened scrutiny." The nondeferential standard of judicial review arises from this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In those cases, the Court held that the judiciary may subject exactions of physical interests in land imposed on individual permit applications to "heightened scrutiny." However, as this Court recognized in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999): "[W]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use. . . . "

Nevertheless, in *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000), the Ninth Circuit went beyond administratively imposed exactions to apply nondeferential review to rent control legislation. The Ninth Circuit

opinion conflicts with the interpretation of the "substantially advances" standard by the other circuit courts. The decision allows the federal court to discard any notion of deference to the decisions of a legislative body as to the efficacy of land use regulation. Accordingly, the Ninth Circuit has expanded judicial power to second-guess the decisions of legislatures far beyond any limits imposed by the Constitution. Under *Chevron*, courts would become legislatures, substituting their judgment as to wise and effective land use policy for the decisions of elected representatives. This frontal assault on representative democracy and the Separation of Powers warrants review by this Court.

## STATEMENT OF THE CASE

In response to escalating retail gasoline prices, in 1997 the State of Hawaii adopted Act 257 ("Act"). The Act limits rents that oil companies may charge their retail gas station dealer/lessees for company-owned stations to 15% of the dealer's gross profit from gasoline sales. App. 3.[1] The Act allows a dealer to transfer its leasehold interest in the station to another dealer. According to plaintiff Chevron, the Act creates the possibility that the dealer assuming the lease would pay a premium to the assigning dealer for the opportunity to lease the station at a below-market rent. App. 4.

Chevron challenged the Act as a regulatory taking on the ground that the Act does not "substantially advance a legitimate state interest." Applying heightened scrutiny to the Act, the district court entered summary judgment

[1] Citations to the decision of the Ninth Circuit are to the Appendix to the Petition for a Writ of Certiorari.

for Chevron on its takings claim. App. 5. The district court found that the Act would not "substantially advances" the objective of reducing retail gasoline prices because dealer/lessees would retain a "premium" from assigning their leases, rather than pass on reduced rents to consumers in the form of lower prices. App. 59, 66.

In a two to one decision, the Ninth Circuit concluded that the district court correctly held that heightened scrutiny applied and would allow the court to inquire into the efficacy of the Act. However, the two-judge majority found that whether the Act substantially advanced a legitimate state interest raised triable issues of fact. The Ninth Circuit's description of the issues to be "tried" in the district court on remand illustrates the extent to which the court assumed legislative powers:

> The conflicting affidavits establish that genuine issues of fact remain as to whether Act 257 will result in lower gasoline prices. Whether, and to what extent, Chevron will raise its wholesale price of fuel to compensate for lost rent, and whether, and to what extent, incumbent dealers will capture the value of the capped rent in the form of a premium upon transfer of the leasehold, remain as unanswered questions.

App. 17. The majority ordered the district court to hold an evidentiary proceeding essentially aimed at predicting whether the Act would serve its intended purpose to reduce retail gasoline prices. App. 20.

Judge William Fletcher concurred in the judgment to reverse the summary judgment for Chevron, but dissented on the instructions to the lower court on remand. App. 28, 37-38. Judge Fletcher concluded that the proper standard of review of the Act under the Takings Clause was not whether the statute "substantially advances a legitimate state interest," but rather whether there is any "reasonable" basis for the legislative judgment. App. 35.

Judge Fletcher went on to find that the Act can be held to constitute a taking only if it has been established with certainty that the law would result in the tenant capturing a premium. Otherwise, Judge Fletcher wrote, a more deferential reasonableness test should apply. App. 28, 37-38, 40.[2] He punctuated his concurring opinion with a warning that the majority was inviting a return to *Lochnerian* substantive due process:

> The question before the judiciary is not the advisability of rent control laws but rather their constitutionality. Ever since its retreat from economic substantive due process at the end of the 1930s, the Supreme Court has essentially left it to the other branches of government to decide, in their political wisdom, whether to adopt rent and price controls.

App. 41.

## REASONS FOR GRANTING THE WRIT OF CERTIORARI

### I. REVIEW BY THIS COURT IS NECESSARY TO ESTABLISH A CLEAR STANDARD OF JUDICIAL REVIEW OF LEGISLATIVE LAND USE REGULATION.

The degree of judicial deference to legislative enactments has fluctuated over time. Between 1897 and 1936, the Court embraced a *laissez faire* economic philosophy, explicitly holding that the Substantive Due Process Clause limited the government's power to secure the

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[2] While Judge Fletcher's views as to the proper standard of judicial review conform more closely to the decisions of this Court than the majority's, even Judge Fletcher's "reasonableness" test departs from the proper standard; namely, the rational basis test. *See* footnote 4, *infra*.

general health, safety, and welfare to those regulations (the "means") that bore a substantial relation to a valid public purpose (the "ends"). *See, e.g., Mugler v. Kansas*, 123 U.S. 623, 661 (1887). In the most extreme application of *laissez faire*, *Lochner v. New York*, 198 U.S. 45 (1905) struck down a state law designed to safeguard the health of bakers by limiting their working hours. In *Lochner*, the Court freely exercised its own judgment as to the appropriate policy for the health of bakers. *See id.* at 56-57. Justice Oliver Wendell Holmes' dissent in *Lochner* laid the foundation for the eventual repudiation of *Lochner's* free-market philosophy: "Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism . . . or of laissez faire. . . . " *Id.* at 75.

Beginning in 1934 and continuing for more than 50 years, the Court abandoned substantive due process.[3] In *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), the Court embraced the deferential standard of judicial review of economic and social legislation:

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[3] *See, e.g., Nebbia v. New York*, 291 U.S. 502, 537 (1934) ("a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adopted to its purpose."); *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963) ("We refuse to sit as a 'superlegislature to weigh the wisdom of legislation'. . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes or some other is no concern of ours."); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 377 (1991) ("[D]etermination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and [*Parker v. Brown*, 317 U.S. 341 (1943)] was not meant to shift that judgment from elected officials to judges and juries.").

> [T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests on some rational basis. . . .

*Id.* at 152.

Since the demise of *Lochnerian* substantive due process, this Court has generally reviewed land use regulation under the Due Process Clause applying the deferential "rational basis" test.[4] Under that test, the court must uphold the regulation unless no reason can be conceived to support it. *Id.* The burden is on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. *Id.*

In *Agins*, however, in 1980, this Court set the stage for a potentially different standard of judicial review of land use regulation. In that case, the Court reintroduced a means-ends test for land use regulation under the Takings Clause. The Court held that the application of a zoning law to property effects a taking if the law "does not substantially advance legitimate state interests." 447 U.S. at 260. Since 1980, two different standards of judicial review applicable to land use regulation have evolved under the "substantially advance" prong of the *Agins* test.

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[4] *See, e.g., Pennell v. San Jose*, 485 U.S. 1, 11-12, 14 (1988) (proper standard of judicial review of legislative rent control is deferential); *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 511 n. 3 (1987) (Rehnquist, C.J., dissenting) ("[O]ur inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation."); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control").

Nondeferential review of the type employed here by the Ninth Circuit, known as "heightened scrutiny," generally applies to "exactions" imposed on a case-by-case basis – where the government conditions approval on the owner's dedication of land to the public to offset the impact of the proposed project. *Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 385. Heightened scrutiny imposes the burden on the government to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. Heightened scrutiny arises from the Court's concern that, in cases of unique, discretionary, adjudicatory exactions imposed on individual applications, the danger exists that the public agency might improperly leverage its police power by requiring an individual property owner to bear more than its share of responsibility for the burdens caused by the development. *Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 385.

The Court has also reasoned that heightened scrutiny is appropriate for administratively imposed exactions of real property interests because such regulations resemble physical takings. *See Nollan*, 483 U.S. at 831; *see also Dolan*, 512 U.S. at 385 ("The sort of land use regulations discussed in [*Euclid*, *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), and *Agins*] . . . differ in [that] the conditions imposed [in *Dolan*] were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.").

In contrast, this Court has indicated that a deferential standard continues to apply to legislative land use regulations that are generally applicable because the risk of the use of the police power to exact unconstitutional conditions is not present. *Nollan*, 483 U.S. at 834-35; *see*

*also Dolan*, 512 U.S. at 385 (courts do not apply heightened scrutiny to regulations that "involve[ ] essentially legislative determinations classifying entire areas of the city") The Court implicitly reasoned that classes of property owners have greater power to influence land use policy in the legislative process and thus require less protection from government overreaching than individual property owners. *See id.* However, the Court has not directly decided whether deferential review applies to legislative land use regulations. Recent decisions of this Court in *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998) and *Del Monte Dunes*, 526 U.S. 687, while clearly suggesting that deferential review is appropriate for legislative regulations, nevertheless have left this question open.

*Eastern Enterprises* involved the constitutionality of the Coal Industry Retiree Health Benefit Act. The Act required coal mining companies to pay money into pension funds for the benefit of their former employees. A four-justice plurality held that the Act worked a taking because it imposed an extreme, retroactive financial burden on the claimant. 524 U.S. at 529-37.

Significantly, a majority of the justices rejected the notion that the "substantially advances" prong of *Agins* enunciated a freestanding takings test outside the *Nollan/Dolan* context of administratively compelled dedications of land. In *Eastern Enterprises*, five justices indicated that the deferential substantive due process test, rather than a takings analysis, should be applied to a law requiring the payment of money. 524 U.S. at 545-46 (Kennedy, J., concurring and dissenting), 554-58 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.). As Justice Kennedy stated, the wisdom of governmental action that does not require the dedication of possessory interests in real property is more appropriately analyzed

under "general due process principles rather than under the Takings Clause." *Id.* at 545 (Kennedy, J., concurring and dissenting); *see also* John D. Echeverria, *Does a Regulation that Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 Envtl. Law 853, 866-76 (1999); S. Keith Garner, *"Novel" Constitutional Claims: Rent Control, Means-Ends Tests, and the Takings Clause*, 88 Calif. L. Rev. 1547, 1561-64 (2000).

In *Del Monte Dunes*, this Court observed that it had thus far applied heightened scrutiny only in "the special context of exactions." 526 U.S. at 702. The Court held that heightened scrutiny was not intended to apply to denials of individual development applications. *Id.* at 702-03; *see also id.* at 723 (Scalia, J., concurring), 733 (Souter, J., dissenting, joined by O'Connor, Ginsburg, and Breyer, JJ.). The Court allowed the jury to determine whether the City of Monterey's conduct "substantially advances legitimate public interests" under the Takings Clause only because the city did not object to a jury instruction allowing that question to be put to the jury. *Id.* at 721-22. However, the Court reserved the question of whether means-ends review under the Takings Clause imposes a different standard of review for generally applicable land use regulation than substantive due process imposes on other police power regulations. *Id.* at 722.

The Court also distinguished between issues of fact in individual cases and issues of a "city's general land-use ordinances or policies." In the former case, the Court held that juries may resolve the question applying a nondeferential standard; in the latter case, the Court stated that the inquiry "might well fall within the province of the judge" applying a more deferential standard. *Id.* at 721-22.

In yet a third case addressing the scope of the "substantially advances" test, only two justices of this Court

expressed the view that heightened scrutiny should be expanded to apply to legislation. In *Parking Assn. of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), the Supreme Court of Georgia held that landscaping and curb requirements for development established by a zoning ordinance did not trigger heightened scrutiny because the regulations in question were legislative. This Court denied certiorari. 515 U.S. 1116 (1995). However, Justices Thomas and O'Connor dissented from the denial of certiorari, urging an expansive reading of *Dolan*:

> It is hardly surprising that some courts have applied *Tigard's* rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking.

*Id* at 1117-18.[5] The remaining justices did not join in this opinion.

Conflict among the decisions of the circuit courts is grounds for granting certiorari. Supreme Court Rule 10. Despite this Court's clear indication that legislative land use regulations should not receive heightened scrutiny, the lower federal courts and the state courts have issued conflicting decisions as to the scope of heightened scrutiny under *Nollan/Dolan*. The cases addressing the application of the "substantially advances" test to generally applicable regulation occupy the full spectrum from

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[5] The dissenting opinion apparently did not consider the Court's rationale for the adjudicatory-legislative distinction expressed in *Nollan* and *Dolan*; namely, that the danger of the government's unfairly leveraging its police power is far greater in cases of individual property owners seeking approval of a single development than in instances of regulation applying across the board to an entire class of similarly situated property owners. *See Nollan*, 483 U.S. at 834-35; *Dolan*, 512 U.S. at 385.

highly deferential review to heightened scrutiny. *Compare New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1088 (11th Cir. 1996), *cert. denied*, 521 U.S. 1121 (1997) (heightened scrutiny not applicable to zoning regulation); *Texas Manufactured Hous. Ass'n v. Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1996), *cert. denied*, 521 U.S. 1112 (1997) (rejecting application of *Nollan* to legislation regulating location of manufactured homes); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (heightened scrutiny inapplicable to hunting license scheme because regulation not a "physical taking or its equivalent"); *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971, 974-75 (N.Y. 1999), *cert. denied*, 529 U.S. 1094 (2000) (heightened scrutiny does not apply to downzoning); *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1001-02 (Cal. 1999), *cert. denied*, 526 U.S. 1131 (deferential standard applies to land use regulations that are "generally applicable through legislative action") *with Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1165-66 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998) (applying heightened scrutiny to legislative rent control); *Chevron*, 224 F.3d 1030, 1033-34 (same); *Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 649 N.E.2d 384, 389 (Ill. 1995) (heightened scrutiny applicable to legislative development impact fee); *Trimen Development Co. v. King County*, 877 P.2d 187, 194 (Wash. 1994) (same); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 482 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (applying heightened scrutiny to rent control legislation).

This Court has not definitively resolved the scope of the "substantially advances" prong of the *Agins* takings test, particularly as it applies to generally applicable land use regulation. The Court should grant review in this case to establish a uniform standard of judicial review of

legislative zoning and other land use regulations under the Takings Clause.[6]

## II. THE COURT SHOULD GRANT REVIEW TO PRESERVE THE POWERS OF ELECTED LEGISLATURES TO DECIDE THE WISDOM AND EFFICACY OF LAND USE REGULATION.

Immediate review of the Ninth Circuit's decision is imperative for amici cities. The cities have enacted scores of laws regulating land use to promote the general health, safety, and welfare and continue to enact such regulations daily. The Ninth Circuit decision invites legal challenges to every one of these regulations as a "taking."

The Ninth Circuit's decision allows aggrieved landowners to avoid the political process entirely. If the decision stands, courts could be permitted to assume the role of legislatures, and the public would be denied a voice in matters that have direct and immediate impact on their safety, property values, economic welfare, and quality of life. The framers of the Constitution could not possibly have intended this result.[7] This Court should therefore

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[6] On January 29, 2001, Greenspring Racquet Club filed a petition for certiorari requesting that the Court adjudicate the same issue presented here; namely, the proper standard of judicial review of a generally applicable zoning ordinance under the "substantially advances" prong of the *Agins* test. *Greenspring Racquet Club, Inc. v. Baltimore County, Maryland*, No. 00-1012. In that case, in upholding a zoning ordinance limiting the height and floor-area ratio of buildings against a takings challenge, the Fourth Circuit deferred to the legislature. The filing of the petition in *Greenspring* is further evidence that the scope of the "substantially advances" standard is an important and unsettled issue warranting immediate review by this Court.

[7] The Chevron majority noted that its decision should be narrowly applied and that it "save[s] for another day the

grant the petition and establish a uniform standard of review of the efficacy of land use regulation that preserves traditional deference to the policy decisions of legislative bodies.

### A. The Ninth Circuit Decision Conflicts with Representative Democracy.

Whether a price control such as that at issue in *Chevron* will have its intended effect in a complex industry is usually the subject of lengthy legislative committee hearings, in which economists, consumer advocates, dealers, and oil companies would present divergent views on the question. Following the gathering of evidence, democratically elected legislators would weigh the opinions of their constituents affected by the proposed regulation and their respective experts to fashion a policy that will promote the general health, safety, and welfare.

Predicting the impact of a price control in a complex business such as the motor fuel industry is quintessentially a legislative policy function. The courts have no greater right to legislate this policy than they have in dictating zoning decisions, safety requirements for autos, or the proper procedure for pasteurizing milk.

*Chevron* raises the potential for abuse of judicial power with regard to all government regulation, not merely land use regulation. The deferential rational basis

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question of whether the 'substantially advances' test applies outside the context of rent control statutes that permit the capture of a premium." App. 12 n. 4. However, the court's reasoning that legislatures cannot be entrusted to make policy with respect to the economic relations between commercial landlords and tenants is easily expanded to apply to all social and economic regulation that affects the value of assets, including all land use regulation.

test, historically applicable to social and economic legislation, would become obsolete. The Ninth Circuit's proposal that the federal courts would conduct their own evidentiary hearing to predict the effects of legislation, *see* App. 15-17, takes a page directly from *Lochner*.

### B. The Ninth Circuit Decision Will Prevent Land Use Planning and Reduce Property Values.

The prospect of defending every land use policy in court will inevitably have a chilling effect on the entire planning process. Governments will be less apt to experiment with new initiatives to respond to rapidly changing conditions. More social and economic problems will be unaddressed. All communities will become more haphazard, congested, and unsafe. Ultimately, the quality of life for all would suffer. What may promote the short-term economic interest of a few property owners will cause immeasurable injury to a public that relies on local government to create well-planned communities.[8]

For example, San Francisco and amici cities enact regulations designed to reduce traffic congestion and preserve open space. The cities have instituted programs to retain affordable housing for low-income households, the elderly, and the disabled. They limit the location of liquor stores and pornography shops to protect children and reduce crime. The cities regulate the size and design of

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[8] At the same time that land use regulations deny property owners unfettered prerogatives to do what they will with their property, these regulations enhance the quality of communities and make all property more valuable. *See, e.g.*, C. Ford Runge, *The Congressional Budget Office's Regulatory Takings and Proposals for Change: One Sided and Uninformed*, 7 Envtl. L. & Prac. 5 (1999) (documenting the "givings" from broadly applied land use regulation that enhance property values).

buildings and billboards to preserve neighborhood character. These zoning regulations preserve property values and create livable communities in which to work and raise families. All of these programs would be at risk under the Ninth Circuit's nondeferential approach to judicial review of land use legislation.

### C. The Ninth Circuit Decision Will Promote Inefficiency and Chaos in Land Use Policymaking.

If courts are to be the final arbiter of land use policy, the enactment of a land use policy by a legislature will mark only the beginning of the decision-making process. The validity of any policy could remain unsettled for years as challenges to the legislation wind their way through the courts. Removing certainty as to the validity of land use regulation will chill investment in projects involving real property.

Moreover, the Ninth Circuit's nondeferential standard of judicial review will flood the courts with lawsuits by property owners, as virtually any zoning regulation would be subject to challenge as a taking. The government could be compelled to defend thousands of land use laws in evidentiary proceedings, at monumental cost to the taxpayers.

Nor do the courts have the institutional competence to study and mediate between competing interests in land use – a function that is the essence of law making. A court confronted with a complex issue of land use planning is no substitute for a local legislative agency that can see the larger picture in the jurisdiction or region. Land uses are interdependent. Effective land use planning requires a broader perspective than one isolated case at one point in time. Indeed, land use regulation is no different than other exercises of the police power that mediate private economic interests and other socially

important goals. Decisions as to the most effective land use policies are best made by legislatures taking the initiative to identify problems, receive evidence from affected parties, debate the advantages of alternative policies, and compromise in order to reach a majority decision. A court with hundreds of cases on its docket is not the proper forum to make land use policy.

### D. The Ninth Circuit Decision Will Shift Land Use Planning to Federal Courts Unfamiliar with Local Conditions.

The Ninth Circuit decision will break down the Separation of Powers at both the federal and state levels, but this problem would be particularly acute where federal courts are involved. Federal courts are not equipped to assume the planning function now performed by state and local legislative agencies. Zoning and planning requires the careful weighing of individual property rights against public values within a local context. Federal judges rarely come from the communities in which land use disputes before them arise. Thus, federal courts cannot be expected to develop the thorough appreciation of local conditions and interests necessary to engage in effective land use planning.

For example, there is no comparison between conditions prevailing in urbanized cities like San Francisco and the patterns of development in Silicon Valley or the rural communities of California's Central Valley. Yet, the Ninth Circuit would have federal judges unfamiliar with local conditions dictating land use rules to each of these diverse communities. Federal judicial policymaking simply does not work in the realm of land use. Not surprisingly, with the exception of the Ninth Circuit, federal courts

have wisely declined to usurp the roles of local zoning boards and state courts.[9]

Indeed, the Ninth Circuit decision runs counter to the pronounced trend *away* from federal preemption of state and local regulation. In a series of recent decisions, this Court has restricted the federal role in economic and social regulation, indicating that such matters are within the purview of the state and local governments. For example, in holding that the Army Corps of Engineers has no regulatory authority to protect migratory birds using non-navigable bodies of water, the Court stated:

> [T]he States' [retain] traditional and primary power over land and water use. ("[R]egulation of land use [is] a function traditionally performed by local governments"). . . . Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources. . . .

*Solid Waste Agency v. United States Army Corps of Engineers*, 121 S.Ct. 675, 684 (2001) (citations omitted). In areas such as disability rights, gender discrimination, and gun control, this Court has returned control of functions previously centralized in the federal government to the states.[10]

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[9] *See, e.g., Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998), *cert. denied*, 525 U.S. 923 (1998) ("The Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards' "); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828-29 (4th Cir. 1995) ("Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts.")

[10] *See, e.g., Board of Trustees of the Univ. of Alabama v. Garrett*, No. 99-1240 (Feb. 21, 2001) (barring recovery by state employees

The ripeness and abstention doctrines constitute additional grounds for reserving land use disputes for resolution by the state courts. These sound policies are designed to preserve the discretion of local legislative agencies and local courts to regulate the use of land. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192-95 (1985) (takings claimant must seek compensation in state court under state procedures before a federal takings claim arises); *Railroad Commission v. Pullman*, 312 U.S. 496, 498 (1941) (land use planning is sensitive area of social policy that federal courts should leave to state courts). These doctrines insure that land use disputes involving state and local governments are heard and determined in the state courts under state law in part because local agencies and courts, not federal courts, have the greatest familiarity with local conditions.[11]

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based on state's failure to comply with federal ADA); *United States v. Morrison*, 529 U.S. 598 (2000) (federal law proscribing violence against women inapplicable to state claim of sexual harassment); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down federal regulation of guns in schools).

[11] Although it is settled law in California that heightened scrutiny does not apply to land use legislation, *see Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d at 1001-02 (deferential standard applies to land use regulations that are "generally applicable through legislative action"), the Ninth Circuit decision nevertheless could have an immediate impact on California government agencies. The Ninth Circuit has flouted *Williamson's* state compensation requirement by allowing takings cases to circumvent the state courts. In *Sinclair Oil Corp. v. County of Santa Barbara*, 96 F.3d 401, 407 (9th Cir. 1996), *cert. denied*, 523 U.S. 1059 (1996) and *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998), the Ninth Circuit held that a facial challenge to regulation on the ground that it does not "substantially advance legitimate state

Here, rent control is a quintessential state and local issue. By adjudicating Chevron's takings claim, the Ninth Circuit has improperly federalized this issue.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: February 23, 2001

Respectfully submitted,

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interests" is ripe in federal court even though the claimant has not sought compensation in state court.

Supreme Court, U.S.
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No. 00-1198

In The

# Supreme Court of the United States

BENJAMIN J. CAYETANO and EARL I. ANZAI,

*Petitioners,*

v.

CHEVRON USA, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY MEMORANDUM OF PETITIONERS

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## REPLY MEMORANDUM OF PETITIONERS

A recent decision deepens the conflict over the issues raised in the petition. The United States Court of Appeals for the Fourth Circuit rejected a facial takings claim in *Greenspring Racquet Club, Inc. v. Baltimore City*, 232 F.3d 887, 2000 WL 1624496 (Oct. 31, 2000), *petition for cert. filed*, No. 00-1227, Jan. 29, 2001. In sustaining the District Court's refusal to conduct a trial to determine whether, in fact, a zoning restriction would achieve its purpose, the Court stated: "When statements by local lawmakers set out legitimate reasons for imposing . . . restrictions on property . . . there can be no claim in federal court that the law fails to substantially advance a legitimate purpose." *Id.* at **5. Thus, the Fourth Circuit has joined the highest courts of California and New York in refusing to impose the higher level of scrutiny ordered by the Ninth Circuit in this case. Indeed, the Fourth Circuit found unlawful just the factual inquiry ordered by the Ninth Circuit here.

Respondent's opposition does not seriously dispute deep and wide conflict with the Ninth Circuit's decision nor confusion in the lower courts about whether and to what extent the Takings Clause requires courts to assess the wisdom of legislation. The importance and timeliness of these issues is evident and is confirmed by the three briefs *amicus curiae* filed on behalf of nineteen Attorneys General, forty-six California cities, and five state and

local government associations. Petitioners renew their request that the Court grant their petition for certiorari.

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